In 1947 Miller became a distributor for Ortman-Miller in the name of Midwest Supply Company and conducted business from an office in Calumet City, Illinois. On
6 the 26th day of February, 1952, Midwest handled about 65% of the sales of Ortman-Miller products and maintained an organization of dealers and representatives throughout the mid-west.

Scott Cuthill was hired by Miller in November of 1950 as a combination bookkeeper and office manager. He worked as an office manager at Midwest where his duties consisted largely of taking invoice orders from Ortman-Miller, billing dealers of Midwest, putting in purchase orders and handling other routine office matters. At Ortman-Miller Cuthill worked as a bookkeeper, which involved making out the payrolls, writing up the books and records and checking receivables.

During the period for which Cuthill has made claim for overtime compensation, that is, from June 3, 1951, to January 11, 1952, Cuthill spent a good deal of time working with Clarence Harney, the external auditor of Ortman-Miller. At this time Harney was changing the bookkeeping and accounting system of Ortman-Miller from a cash to an accrual basis. The time spent by Cuthill working with Harney on this project included all of the hours Cuthill allegedly spent in overtime work. Cuthill worked with Harney during this period on such projects as the preparation of forms for the Office of Price Stabilization in connection with the government's material allotment plan; the audit of the books of Ortman-Miller to revamp its accounting system and the taking of inventories of the machinery and steel on hand at Ortman-Miller.

7 Cuthill testified during the hearing on Miller's petition that he kept a running account of the hours he

worked overtime on some foolscap paper and that he transcribed these notes onto a memorandum which Cuthill furnished his attorney from which the latter claimed he prepared the instant complaint under the provisions of the Fair Labor Standards Act.

Cuthill, by his counsel, Lee M. Burkey, and local counsel, Joseph P. Sullivan, filed the original complaint in this court on June 2, 1953, seeking damages against Ortman-Miller under the Fair Labor Standards Act of 1938, as amended, 29 U.S.C. sections 201-219, for the overtime hours he allegedly worked between June 3, 1951, and January 11, 1952. On June 23, 1953, Ortman-Miller filed its answer by its attorney, Straley Thorpe, disclaiming liability to Cuthill.

On October 7, 1953, the plaintiff filed a request for admissions wherein, among other things, he sought an admission that the plaintiff was employed by the defendant on tax matters during the period in question. The defendant refused to admit this, stating that when Cuthill was employed on any tax matters involving the defendant, he was the employee of Harney.

The judgment which the intervenor seeks to have set aside was entered on December 21, 1953. Attorneys Sullivan, Burkey, and Thorpe appeared in court on that day and the latter two attorneys made certain statements to the court, the gist of the statements being contained
9 in the following quotations from the reporter's transcript of the proceedings:

> "Mr. Burkey: Subject to your Honor's direction, we would be prepared to briefly prove up by evidence the facts alleged in our complaint. • • • We are well in agreement on the judgment. However, we have no stipulation. There was some thought that we might better prove it, rather than stipulating to the facts in the case."

> "Mr. Thorpe: I would like to say this, your Honor: This Company has been confronted with numerous lawsuits, with some pretty bad charges, and I am confronted with a situation where I just can't stipulate the facts. I can go along with this; I want this man to be paid; and I can determine pretty well what the amount is. I should like, if it is not asking too much, that the record should show that there was evidence heard and that the Court made a finding on this; if it is not asking too much, I should like that, because I might be confronted somewhere with the statement that I had agreed to this judgment. I would rather, if we could, do it that way, if it is not an imposition upon your Honor."

Later in the proceeding Burkey asked some questions of Cuthill. Cuthill testified that he was employed at Ortman-Miller and at Midwest during the period June 3, 1951, through January 11, 1952; that he was a combination bookkeeper and office manager; that he was hired by Miller; that he worked about 900 hours of overtime during that period; that he computed his time from records he kept and from records kept by Harney; that he was receiving a salary of about $87.50 a week and that there had been a computation of the amount of overtime he was entitled to, and the figure arrived at was $4,100. The court then asked some questions of the attorneys regarding the computation of this amount. Burkey explained
9 that it constituted liquidated damages, attorneys fees and court costs. In that connection he stated: "A portion of this is liquidated damages. Actually, the figure, as I computed it, came out for this period, $2,930.63. The difference between that and $3,575.00 is liquidated damages. Likewise, there is also included in the total of $4,100, $500 attorney's fees and $24.05 as court costs." The same day judgment was entered against Ortman-Miller in the amount of $4,100 and a check for this

amount was deposited with the clerk in satisfaction of the judgment.

On the following day Miller filed a petition for leave to intervene, vacate the consent judgment, and defend on behalf of Ortman-Miller. A motion to strike Miller's amended petition was granted and he appealed from the ruling.

The averments of Miller's amended petition charge that Thorpe, Cuthill, and Harney planned to defraud Miller, the company, and the court; that the company's officials and its counsel well knew that Ortman-Miller owed Cuthill nothing; that the company deliberately concealed its valid defense from the court; that, as a result of the charged collusion, a fraudulent judgment was entered and $4,100 of the company's funds was placed in the hands of the clerk to satisfy it, and, unless relief could be had, the money would be wrongfully diverted in satisfaction of the fraudulent judgment and that counsel for Ortman-Miller had deliberately failed to act for and in the company's interest.

The court of appeals reversed the ruling of this court granting the motion to strike, and held that Miller's petition to intervene should have been allowed, and that he was entitled to a hearing on his petition to vacate the consent judgment and defend on behalf of Ortman-Miller. The court of appeals held that the averments of the amended petition, if substantiated, would be a basis for setting aside the judgment under Rule 60(b) of the Federal Rules of Civil Procedure.

Before deciding whether the evidence introduced by the intervenor supports the claims of fraud set forth in his petition, it becomes necessary to analyze the nature of the fraud charged by the intervenor. The gist of this charge is that, (1) it was represented to the court that

Cuthill had a legitimate claim for overtime compensation against Ortman-Miller, when in fact, Cuthill and Thorpe knew that he had performed no overtime work for that company, and, (2) Thorpe deliberately concealed from the court the real nature of the $4,100 amount allowed the plaintiff by the judgment (by filing an answer for the defendant denying liability, by filing the answers to the request for admissions, and by the representations made to the court on December 21, 1953). In support of these charges the intervenor asserts that Cuthill, Harney,
11 Burkey and Thorpe knew that Cuthill did not have a claim for overtime compensation under the Fair Labor Standards Act; that Thorpe desired to pay Cuthill on his claim at the time he filed the denial for Ortman-Miller and that the entire proceeding before this court, beginning with the filing of the complaint, was a facade and an attempt to invoke the court's judicial machinery to protect a collusive scheme between Thorpe, Cuthill and Harney; a scheme in which Burkey later became involved. The object of this scheme, the intervenor alleges, was to pay Cuthill for his participation on the side of Thorpe and Harney in other judicial controversies, wherein Thorpe and Harney have been and are adversaries of the intervenor.

In his attempt to substantiate the averments of fraud just reviewed, the intervenor introduced an abundance of evidence relative to the deposing of Miller as president of Ortman-Miller, and the acquisition by Ortman-Miller of the distributorship business formerly owned by Miller under the name of Midwest Supply Company. I permitted the introduction of this evidence during the hearing but reversed a ruling on its materiality to the issues involved in the hearing until such time as all the evidence had been presented. The intervenor contends that this evidence is material because the fraud which he

charges was a continuing fraud and commenced with the conception of a plan to oust Miller, president of
12 Ortman-Miller and to acquire the business of Midwest.

It is obvious that this evidence has no materiality on the issue of the validity of Cuthill's claim for overtime compensation, as such. Insofar as it sheds any light on the averments of fraud on this court, and as it relates to the motives and reasons for this alleged fraud, however, I have taken into consideration the evidence relative to the history of the dispute between the intervenor and the other parties connected with Ortman-Miller.

In this regard many of the facts found by the trial court in the case of *Miller* v. *Ortman*, 124 N.E. 2d 390 (1955), and approved by the Appellate Court of Indiana, are relevant. These facts have to do with the relationship of Miller and Midwest Supply Company to Ortman-Miller and their dealings with the corporation; the difficulties which arose between Miller and the other stockholders of the corporation; the events which lead to Miller's dismissal as president of Ortman-Miller and the action of its directors in refusing to accept any further orders from Midwest. The evidence in the instant proceeding is consistent with and substantiates the facts in regard thereto as found by Judge Leopold in the action tried in the Jasper County Circuit Court.

Those findings, however, do not allude to any of the activities of Cuthill in relation to the ousting of Miller and the acquisition of Midwest's business by Ortman-
13 Miller. These matters were raised for the first time during this hearing.

The intervenor charged that Cuthill, having become familiar with Miller's distributorship business by reason of his position as office manager at Midwest, conspired

with Harney and Thorpe in the plot of the latter two for the acquisition of Midwest's business. In support of this the intervenor further alleged that Cuthill, while working with Harney, divulged information relative to Midwest's business in derogation of the confidence imposed on Cuthill by Miller, and in furtherance of the conspiracy against Miller; that Cuthill was present and played an active part when notices were sent to representatives of Midwest informing them that the board of directors of Ortman-Miller had determined that no further orders would be accepted from Midwest and that Cuthill signed an affidavit of Miller's alleged misconduct for use by Thorpe in opposing a motion by Miller for a new trial, growing out of one of the suits between Miller and the other parties connected with the defendant. The evidence does indicate that Cuthill signed such an affidavit and that he was present when the notices were sent out, but, the other allegations having to do with the conspiracy by Cuthill with Harney and Thorpe are credible only if the complete chain of inferences made by the intervenor as to the fraudulent conduct of Cuthill, Harney and Thorpe is found to be true. There is no direct evidence of fraud before this court on any of the charges made by the
14 intervenor, and the proof of any inference or charge lies in the credulity of the series of events as asserted by Miller.

Having in mind the facts and charges surrounding the dispute between Miller and the other parties connected with Ortman-Miller at the time Cuthill filed his complaint in this court, a determination of the major issue raised by the intervenor's petition will be made: were there any fraudulent misrepresentations made to this court? It is evident that the intervenor's right to have the judgment set aside under Rule 60(b) must lie in the determination of whether he has shown any such misrepresentations.

As discussed previously, one of these alleged misrepresentations was that Cuthill had a valid claim for overtime compensation. The facts relating to the type of work performed by Cuthill and as to how the claim for overtime hours was made, have already been related. These facts were testified to by Cuthill, Harney, Thorpe and Burkey. Significantly, the intervenor offered no evidence to refute the petitioner's claim of the overtime hours worked, and Miller himself testified that he believed Cuthill performed extra work under Harney's supervision.

The plaintiff's contention, that where an employee is hired to work for two companies affiliated with one another, or, is their common employee, the hours worked by the employee for both are to be totaled to determine whether he has worked in excess of forty hours for the joint employers during the week, is a tenable one. *Mitchell* v. *Bowman*, 26 Labor Cases, Par. 68, 606. It has also been held that the oral testimony of the employee as to the number of overtime hours he worked during a certain period, is sufficient evidence to uphold a finding in accord with such testimony. *Porter* v. *Poindexter*, 158 F. 2d 759 (10th Cir. 1947). The intervenor pointed to the fact that Cuthill would have had to work 70 hours a week to accrue enough hours to support his claim. In the *Porter* case, the employee's testimony was to the effect that he worked 75½ hours a week for a period of two years. The intervenor also asserts that Cuthill was an exempt employee under the Fair Labor Standards Act because his position as office manager at Midwest made him an executive employee within the provisions of the act. Although I don't think it necessary to determine this question now, there is authority which holds that a combination bookkeeper and office manager is not exempt as an executive employee under the act.

The decision which I am confronted with on this issue is not whether the court would find for Cuthill were his claim relitigated, but whether he misrepresented to this court the fact that he had a claim for overtime compensation, and whether the corporation or its attorney participated in a fraud by knowingly refusing to raise a defense which it or he believed could have prevented a recovery. Under all the facts and the legal principles just reviewed I cannot find that there were any such misrepresentations made to this court by Cuthill or his counsel; nor, can I find that either the corporation or its attorney participated in a fraud by failing to defend the claim any more than was done. See *Johanna Lenhart* v. *Lenhart Wagon Company*, 298 N.W. 37; see also Annotations in 135 A.L.R. 838. Where a minority shareholder seeks to set aside a judgment because of fraud in its procurement, he has the burden of proving fraud and misrepresentation, and fraud is not to be presumed but must ordinarily be proven by clear and convincing evidence. In the *Matter of Hadden* v. *Rumsey Products Inc.*, 96 F. Supp. 988 (W.D.N.Y. 1951); *Fiske* v. *Buder*, 125 F. 2d 841. Moreover, if the evidence is as consistent with innocence and a lawful purpose as with guilt it is insufficient to substantiate the burden of proving fraud. *Dart* v. *McDonell*, 107 Wash. 294, 182 Pac. 628; *Fuller* v. *Garber*, 16 N.E. 2d 251; *Tribune Co.* v. *Thompson*, 342 Ill. 503, 174 N.E. 561.

The other alleged misrepresentation has to do with the adversary attitude of the opposing parties and counsel from the time the complaint was filed with this court. The intervenor asserts that the representations to the court of the negotiations between the attorneys for Cuthill and the corporation, and the compromise which grew out of these negotiations, were misrepresentations intended to secrete from the court the fraudulent scheme to pay

off Cuthill. The evidence relative to this issue, as presented during the hearing on the intervenor's peti-
17 tion, is as follows.

Burkey, when called as a witness by the intervenor, stated that he had never heard of Scott Cuthill, Midwest Supply Company, Ortman-Miller Machine Company, nor anyone connected with the latter two companies, before Cuthill first came to his office in March of 1953. Suit was filed by Burkey on June 2, 1953, and, he stated that he had never heard of Thorpe nor Richards (co-counsel for Ortman-Miller during these proceedings) before he filed suit.

On October 7, 1953, Burkey had a conference with Richards at Burkey's office. Again on October 27, 1953, Richards conferred with Burkey at Burkey's office. On November 12, 1953, Burkey wrote a letter to Richards in the first paragraph of which he stated: "When we conferred on October 27, 1953, you indicated that you would like to know the total sum which we considered due to Mr. Cuthill under the Wage-Hour Law." Burkey continued in the letter to indicate the amount owed Cuthill. In lieu of the amount requested in the complaint, which was $5,861.36, Burkey said that Cuthill was willing to settle for $5,295.72, which consisted of $3,953.75 due Cuthill, $1,317.92 attorney's fees and $24.05 costs. The letter indicated that this sum did not include liquidated damages, to which Burkey claimed Cuthill was entitled.

Sometime in December of 1953 another meeting was held in connection with Cuthill's claim. At this meet-
18 ing Thorpe, Richards, Burkey and Sullivan were present. It was at this conference that a settlement was purportedly reached. Sullivan, who was not present during the hearing on the intervenor's petition, except to testify, was called as the court's witness to give an

account of this meeting. Sullivan testified that the settlement was arrived at as any settlement would be; that there was compromise; that Burkey did most of the talking for them and that the conversation mainly involved mathematical computations and discussion of the claim in light of the Law of the Fair Labor Standards Act.

The intervenor's charges of fraud and collusion between the parties and counsel cannot stand up beside this evidence of the adversary attitude of the parties and their counsel from the time the complaint was filed until their appearance in court on December 21, 1953.

In accordance with the findings of fact and conclusions of law incorporated in this opinion the amended petition of the intervenor to vacate the consent judgment and defend on behalf of the corporation is denied. The Clerk is directed to enter an order to that effect.

Enter:

Luther M. Swygert
Judge

Hammond, Indiana

19 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Indiana
Hamond Division

Scott Cuthill,
Plaintiff,

vs.

Ortman-Miller Machine Corporation,
Defendant,

and

J. Carter Miller,
Intervenor.

Civil No. 1479

NOTICE OF APPEAL.

(Filed Dec. 28, 1956)

J. Carter Miller, Intervenor, hereby gives notice that he appeals to the United States Court of Appeals for the Seventh Circuit from this Court's order and judgment of August 29th, 1955, wherein the Court denied intervenor's, (Miller), amended petition to vacate the consent judgment and defend on behalf of the defendant corporation.

And said J. Carter Miller, Intervenor, further gives notice that he appeals to the United States Court of Appeals for the Seventh Circuit from this Court's order of November 30th, 1956, denying intervenor's separate motions for amendment of opinion to include omitting findings and motion for a new trial.

J. Carter Miller, Intervenor,

By: Owen W. Crumpacker,
Theodore M. Gemberling,
Lowell E. Enslen,
5217 Hohman Avenue,
Hammond, Indiana,
His Attorneys.

20 IN THE UNITED STATES DISTRICT COURT
For the Northern District of Indiana
Hammond Division

Scott Cuthill,
Plaintiff,

vs.

Ortman-Miller Machine Company,
Defendant.

Civil No. 1479

AMENDED PETITION FOR LEAVE TO INTERVENE, VACATE CONSENT JUDGMENT, AND DEFEND ON BEHALF OF THE DEFENDANT CORPORATION.

Comes now J. Carter Miller, a stockholder of the defendant corporation, and respectfully petitions the Court to vacate the judgment entered herein against it on December 21, 1953, and to permit him to defend this action on its behalf, and shows:

1. He is one of the original incorporators of the defendant corporation. He owns 20% of its stock, and owned same at the time of the transactions herein complained of. This amended petition is not collusive for the purpose of conferring jurisdiction of any action on a Court of the United States which it would not otherwise have. Any demand upon the managing directors, officers or other stockholders of the corporation to secure the action herein sought would have been futile for the reasons hereinafter set forth. He files this amended petition as of right under Rule 15, since this Honorable Court treated his original petition "as an independent action to obtain

equitable relief from the court" and "as a complaint under the federal rules of procedure". His original petition was filed on December 22nd, 1953, the day after the judgment herein was rendered. This amended petition is being prepared on the day he received a copy of
21 the order of this Honorable Court granting plaintiff's motion to strike.

2. Petitioner, along with one Alva Ortman and Carl Speichert, organized and incorporated the defendant corporation in 1945 as a job order machine shop business. Petitioner, on incorporation, owned ten (10) shares of stock, Carl Speichert owned ten (10) shares of stock, and Alva Ortman owned thirty (30) shares of stock. Approximately one year after incorporation Alva Ortman transferred twenty (20) shares of his stock to his brothers Nelson Ortman and Harold Ortman. From the date of incorporation in 1945 until approximately March 3rd, 1952, petitioner was president of defendant corporation as well as a director of the same. Nelson Ortman and Harold Ortman became directors after receiving stock from their brother Alva.

3. Petitioner, in 1946, organized as a sole proprietorship, a business known as Midwest Supply Company with its principal offices at 704 Wentworth Avenue, Calumet City, Illinois. This distributorship originally acted under license from the War Assets Administration of the United States government as a distributor of surplus government owned machine tools. This distributorship, Midwest Supply Company, had agents in the principal industrial centers of the United States. When executive orders were issued by the federal government freezing further sale of government owned machine tools, Midwest Supply Company became a distributor of privately owned machine tools.

4. In the summer of 1947, petitioner obtained the plans and specifications for the manufacture of a hydraulic cylinder from a man named Vance Starrett in Plymouth, Indiana. Speichert and the Ortmans agreed to manufacture the cylinder, Petitioner agreed to distribute it, through Midwest Supply Company. The first cylinder was produced by the corporation in February of 1948. From February, 1948, through February, 1952, Midwest Supply Company placed approximately 7500 purchase orders with the corporation for hydraulic cylinders. These purchases were resold by Midwest Supply Company through its agents and dealers. By virtue of the introduction, manufacture, and sale of the hydraulic cylinder, the gross business of Ortman-Miller Machine Company grew from approximately $65,000 per year in 1947 to $880,000 in the calendar year 1951. At the close of the calendar year 1951, the corporation had on hand $175,000 of undistributed profits. Prior to March 3rd, 1952, no dividends were declared or paid. The five directors, including petitioner as plaintiff, enjoyed equal salaries and bonuses. Midwest Supply Company sold approximately $650,000 worth of cylinders in 1951, resulting in a net profit of $45,000 to petitioner.

5. Some time in 1948, petitioner hired one Straley Thorpe as attorney for the corporation. The remaining four directors consented to his employment and consented to the payment to him of $100.00 per month as a retainer.

6. In April of 1951, the corporation's auditor and accountant having passed away in late 1950, Straley Thorpe obtained the appointment of one Clarence Harney as auditor and accountant. Clarence Harney was an office associate of C. Ballard Harrison, a close friend and for-

mer associate of Straley Thorpe. Between April of 1951 and June 1st, 1952, Harney became familiar with the books and accounts of the corporation. He likewise became completely familiar with the books and accounts
23 of the Midwest Supply Company.

7. Shortly after January 1, 1952, Harney consulted with Thorpe on a wage and hour problem. He apprised Thorpe of the fact that the corporation had made a profit of $200,000, before federal taxes, during the calendar year 1951. Thorpe, being uncollectible and judgment proof, and being in a position of trust and confidence with regard to the corporation's affairs, and being familiar with the business of Midwest Supply Company, having drawn at least one agency contract for it in 1951, saw the opportunity of enjoying larger profits through his connection with the corporation.

8. On January 24, 1952, after his conference with Harney, Thorpe asked Miller, as president of defendant corporation, to meet with him in his office to discuss an important matter. Thorpe then requested that he be employed at the corporation for a couple hours a day doing administrative work. This request was refused by petitioner. Thereupon, Thorpe and Harney waited until Miller left for a vacation in Florida. They then called a secret meeting of the remaining directors of the corporation in Thorpe's office on Sunday morning, February 17, 1952. At this meeting, Thorpe and Harney outlined initial plans to the three Ortmans and Speichert (machinists without formal education) to oust Miller, obtain his stock, and confiscate the distributorship business. The Ortmans and Speichert, having been misled by false and fraudulent misrepresentations that Miller had made the individual directors liable to government prosecution for falsification of books, joined in the plan

and scheme as outlined by Harney and Thorpe. Petitioner was locked out of the plant on March 3rd, and purportedly voted out of his office as president on March 5th.

Thorpe assumed the role as recording secretary to
24 write corporate minutes for the machinists, purportedly justifying the action taken. Telegrams and confirming letters were sent to the dealers and agents of Midwest Supply Company advising them to break their contractural relationships with Midwest Supply Company and deal directly with the corporation at increased commissions. An attempt was made by Thorpe to force Miller to put up his corporate stock, endorsed in blank, with Thorpe as collateral for alleged faithful performance of an employment agreement between the corporation and Miller. A few days later, Thorpe caused an action to be filed in the Lake Superior Court Room No. 5 against Miller and obtained a temporary restraining order without notice, freezing a $95,000 business account, although posting an inadequate $10,000 surety bond. With his business funds frozen, all income from the corporation cut off, the dealers and agents of Midwest Supply Company coerced to deal directly with the corporation, Miller was prostrated. He brought an injunction action in the Lake Circuit Court which was eventually tried in the Jasper Circuit Court and is pending on appeal in the Indiana Appellate Court. He filed a minority stockholder's action which is presently pending in the Newton Circuit Court. He has a cross-complaint for damages and fraud pending in the Jasper Circuit Court against Thorpe, Harney, the three Ortmans, and Speichert. In these actions he has been, since February 13, 1952, actively seeking redress for the wrongs done him.

9. Plaintiff Scott Cuthill was the office manager of Midwest Supply Company prior to the closing of the offices in July of 1952, when the dealers and agents were successfully confiscated by Thorpe, Harney, the Ortmans, and Speichert. During the trial of the injunction suit at Rensselaer, Cuthill actively collaborated with the Ortmans and Speichert to accomplish the objects of the conspiracy as hereinabove mentioned. He furnished Thorpe with an affidavit of alleged misconduct on Miller's part which Thorpe filed in the action at Rensselaer. Your petitioner is informed that he was given full employment by Ortman-Miller as a partial reward for his collaboration. Some disagreement having arisen between Cuthill and the Ortmans and Speichert, Cuthill began working for Harney at Harney's office (which Cuthill swore under oath to be his place of residence in open court on December 21, 1953, in these proceedings). Cuthill, as office manager for Miller, is in a key position as a witness in the litigation pending in the state courts. With a minority stockholder's suit pending, a means was devised for payment out of the corporation's treasury of some money. Although Harney swore under oath at Rensselaer that he paid Cuthill for work done during the period alleged to be overtime work in the complaint in this action, Harney furnished figures (according to the sworn testimony of Cuthill) from the corporation's books to justify a Fair Labor Standards Act overtime claims as a means for rewarding Cuthill for his past and future services as a witness. The corporation's attorney, charged with the defense of the litigation growing out of the fraudulent conspiracy hereinabove described, fully knew of the method and plan for paying Cuthill. He also fully knew that Cuthill performed no overtime work for the corporation during the period mentioned, and that he was collaborating

after hours on a few occasions with Harney and was presumably paid by Harney.

10. Thorpe, a defendant himself in the fraud cases in the state court, needing Cuthill to protect him as well as Harney and the co-defendants, the three Ortmans and Speichert, was quite willing and anxious to use the corporation's money to satisfy a key witness. This accounts for the fact that although he filed answer denying certain allegations of the complaint, he arrived in court on December 21, 1953, refused to stipulate as to the facts, urged the district court to enter judgment against the company which he was assuming to represent, and fully represented to the court, in open court, that he checked the figures and $3575.00 was the amount he had coming. He arrived with a check from the corporation, a form of judgment, and a satisfaction of judgment.

11. Cuthill is a professional man, an accountant, and, according to the sworn testimony of Harney in a prior proceeding, an office manager. He performed no overtime work for Ortman-Miller Machine Company. These matters were fully known to both Harney and Thorpe. Thorpe, however, concealed these facts from the District Court on December 21st, 1953. This resulted in a fraud being perpetrated on the corporation by its attorney of record.

12. Under the above and foregoing facts, a fraud is being perpetrated upon the court. The machinery of the District Court is being used as a conduit for the payment of funds out of the corporation's treasury to a party who is a key witness in litigation in which personal judgments are sought against the individual directors, the corporation accountant, and the corporation attorney Thorpe. Thorpe is assuming the role of corporation attorney in these proceedings in an attempt to conceal his individual interest.

13. The real defense was deliberately concealed from the court on December 21st.

14. The corporation's attorney of record was in fact acting in his own individual interest.

Wherefore, your petitioner respectfully prays that the judgment heretofore entered be vacated and set aside and that your petitioner be permitted to defend the claim upon such terms and conditions as the court deems just under Rule 60 B.

27

Owen W. Crumpacker,
Theodore M. Gemberling,
Attorneys for Petitioner.

State of Indiana,
County of Lake, ss:

I, J. Carter Miller, being first duly sworn upon my oath, do depose and say that: I have read the above and foregoing amended petition; I am familiar with the matters set forth therein, and the facts so stated are true according to your petitioner's information and belief.

J. Carter Miller.

Subscribed and sworn to before me this 30th day of January, 1954.

Edmund A. Schroer,
Notary Public.

My Commission Expires: August 18, 1956.

IN THE UNITED STATES COURT OF APPEALS

For the Seventh Circuit

No. 11184.

OCTOBER TERM, 1954, OCTOBER SESSION, 1954.

SCOTT CUTHILL, *Plaintiff-Appellee,*

vs.

ORTMAN-MILLER MACHINE COMPANY, Defendant-Appellee,

and

J. CARTER MILLER, *Intervenor-Appellant.*

Appeal from the United States District Court
for the Northern District of Indiana,
Hammond Division.

28 October 14, 1954.

Before DUFFY, *Chief Judge,* and MAJOR and LINDLEY, *Circuit Judges.*

LINDLEY, *Circuit Judge.* Appellee Cuthill brought suit in the District Court against appellee Ortman-Miller Machine Company to recover unpaid overtime compensation, damages and attorneys' fees, which he claimed due him under the Fair Labor Standards Act. In its answer to the complaint, the company admitted that the plaintiff was a part-time employee but denied that it owed him any of the sums demanded. In answers to interrogatories propounded, it declared that plaintiff was not its employee but was hired by its tax attorney and accountant; it denied owing him anything. At the trial, at which the corporation offered no evidence, judgment for plaintiff was entered in the sum of $4100.00 on December 21, 1953, and, on the same day satisfied by payment in full to the clerk of the court.

On the following day appellant filed a motion for leave to intervene, which the court denied on January 28, 1954.

29 On January 30 he filed his amended petition for leave to intervene. He averred that he owned 20% of the corporate capital stock; that he had served as president from 1945 until March 1952; that, early in 1952, his corporate associates and their attorney fraudulently attempted to force him out of the business and to deprive him of his investment. Though the averments were in great detail, no good purpose would be served by repeating them here. Suffice it to say, appellant, upon particularized averments, charged that the parties named had deliberately planned to defraud him, the company and the court; that the company's officials and its counsel well knew that the corporation owed Cuthill nothing and wrongfully failed to resist his suit; that Cuthill knew that the company owed him nothing; that the company deliberately concealed its valid defense from the trial court; that, as a result of the charged collusion, a fraudulent judgment was entered and $4100.00 of the corporate funds placed in the hands of the court to satisfy it and unless relief could be had, would be wrongfully diverted by satisfaction of the fraudulent judgment; and that counsel for the corporation had deliberately failed to act for and in the corporate interest. He prayed that upon his intervention, the court, upon hearing, set aside the judgment and permit proper defense to be made to Cuthill's alleged fraudulent claim. April 15, 1954, the court denied the motion for leave to intervene. From this order appellant has appealed, asserting that the court erred in denying him relief. Both appellees, plaintiff and defendant below, insist that the order should be affirmed.

Rule 24 (a) of the Rules of Civil Procedure provides that upon timely application one shall be permitted to intervene (a) when the "representation of the applicant's

interest by existing parties" is adequate and the applicant is or may be bound by a judgment in the action, or (b) when the applicant "is so situated as to be adversely affected by" disposition of property in the custody or control of the court or an officer thereof. Comparing the mandatory provisions of the rule with the averments of appellant's petition, it is obvious that he brought himself within the rule by charging explicitly that as a stockholder he had a substantial interest in the $4100 then in the custody of the court; that the corporation's interests, including appellant's, were not adequately represented in that the company and its counsel had permitted a fraudulent judgment to be entered; and that if corporate
30 funds were improperly diverted in satisfaction of the allegedly fraudulent judgment, his interests would be adversely affected. In this situation the court could not properly do otherwise than permit him to present his case. Thus, in *Pellegrino* v. *Nesbit et al.*, 203 F. 2d 463 (C. A. 9), at page 465, the court said: "Intervention should be allowed even after a final judgment where it is necessary to preserve some right which cannot otherwise be protected." In *Price, Trustee, et al.* v. *Gurney et al.*, 324 U. S. 100, at page 105, the court said: "* * (I)f a corporation has a defense to an action against it and is not asserting it, a stockholder may intervene and defend on behalf of the corporation." See also to the same effect *Atlantic Refining Co.* v. *Port Lobos Petroleum Corp. et al.*, 280 Fed. 934, subsequent opinions 283 Fed. 681 and 701; *Howes* v. *City of Oakland*, 104 U. S. 450.

The facts pleaded were sufficient to justify appellant's fears; they brought him within the doctrine enunciated by the Supreme Court in *United States* v. *Throckmorton*, 98 U. S. 61, at 65, where the court said: "Where the unsuccessful party has been prevented from exhibiting fully his case by fraud or deception practiced on him by his op-

ponent, as by keeping him away from court, a false promise of a compromise; or where the defendant never had knowledge of the suit, being kept in ignorance by the acts of the plaintiff; or where an attorney fraudulently or without authority assumes to represent a party and connives at his defeat; or where the attorney regularly employed corruptly sells out his client's interest to the other side,—these, and similar cases which show that there has never been a real contest in the trial or hearing of the case, are reasons for which a new suit may be sustained to set aside and annul the former judgment or decree, and open the case for a new and fair hearing." Citing cases. See also *U. S.* v. *Kusche*, 56 F. Supp. 201, at page 216. Here appellant pleaded with particularity and great detail facts tending to show that there had been no adversary trial of the issue in the case; that this situation emanated from the collusion of the original parties; that appellant's interests were adversely affected and that no adequate representation of his and the corporate interests had been supplied. Inasmuch as Rule 60 (b) endows the court with power to vacate any fraudulent judgment, plaintiff was entitled to be heard upon his averments.

31 Obviously the District Court has inherent power to investigate such averments of fraud. *Hazel-Atlas Co.* v. *Hartford Empire Co.*, 322 U. S. 238; *Universal Oil Products Co.* v. *Root Refining Co.*, 328 U. S. 575. Indeed under Rule 60 (b) the prescribed remedy for relief from a vulnerable judgment is by way of motion or independent action. Review by *coram nobis, coram vobis, audita querela,* bills of review and bills in the nature of bills of review are abolished.

It is suggested that the order denying intervention is not appealable. We do not agree In *Brotherhood of Railroad Trainmen* v. *Baltimore & Ohio Railroad Co. et al.*, 331 U. S. 519, at page 524, the court said: "But where a statute or the practical necessities grant the applicant

an absolute right to intervene, the order denying intervention becoms appealable. Then it may fairly be said that the applicant is adversely affected by the denial, there being no other way in which he can better assert the particular interest which warrants intervention in this instance. And since he cannot appeal from any subsequent order or judgment in the proceeding unless he does intervene, the order denying intervention has the degree of definiteness which supports an appeal therefrom. See *Pipe Line Co.* v. *United States*, 312 U. S. 502, 508." This was adhered to in *Dickinson* v. *Petroleum Conversion Corp*,. 338 U. S. 507, at 513. See also *Missouri-Kansas Pipe Line Co.* v. *United States et al.*, 312 U. S. 502, at 508. As the Court of Appeals for the Ninth Circuit aptly said, in *Pellegrino* v. *Nesbit et al., supra*, at 466: "Where, as here, intervention is sought as a matter of right, an order denying intervention has the degree of definiteness and finality necessary to support an appeal therefrom, since there is no other way in which the stockholder can assert the particular interest which he alleges warrants intervention." To the same effect are *Wolpe et al.* v. *Poretsky et al.*, 144 F. 2d 505 (C. A. D. C.), at 508, and *People of the State of California* v. *United States*, 180 F. 2d 596 (C. A. 9). This court has heretofore recognized the propriety of an appeal from such an order in *Pure Oil Co.* v. *Ross et al.*, 170 F. 2d 651.

We know not what proof appellant may be able to
32 produce, but we are of the opinion that he should be permitted to intervene and have his day in court. The order is reversed with directions to proceed accordingly.

A true Copy:

Teste:

.....

Clerk of the United States Court of Appeals for the Seventh Circuit.

Dissenting Opinion in 124 N.E. 2d 390; 125 N.E. 2d 257.

33 THE STATE OF INDIANA,
IN THE APPELLATE COURT, NOVEMBER TERM, 1954

On the 24th day of February, 1955, being the 82nd Judicial day of said November Term, 1954.

No. 18459

Hon. Dewey Kelley, Chief Judge
Hon. Donald E. Bowen
Hon. John A. Kendall
Hon. Wilbur A. Royse, P. J.
Hon. Harry L. Crumpacker
Hon. John W. Pfaff
Associate Judges

In the case of

J. Carter Miller, both
individually and d/b/a Midwest
Midwest Supply Company
individually and d/b/a
Appellant

vs.

Alva Ortman, etc., et al.
Appellees.

Come the parties by their attorneys, and the Court being sufficiently advised in the premises, gives its opinion and

BOWEN J., *Dissenting Opinion.*

34 I cannot agree with the majority opinion in this case. Furthermore, I strongly feel that the majority in the instant case, with Judges Kelley and Crumpacker

not participating, have reached a result which appears to me to be an arrant miscarriage of justice. The majority opinion, as far as the citation of authority is concerned, appears to be grounded upon two previous decisions of this court, *Grimm et al* v. *Baumgart* (1951), 121 Ind. App. 626, 96 N.E. 2d 915, 97 N.E. 2d 871, and *International Shoe Company* v. *Lacey* (1944), 114 Ind. App. 641, 646, 53 N.E. 2d 636. Both of these cases would serve as authority for the proposition that as between the appellant and the corporation, Ortman-Miller Machine Company, Inc., the Ortman-Miller Machine Company had the right to terminate the working agreement between such corporation and the appellant, doing business as a distributor under the name and style of Midwest Supply Company. This is a correct statement of the law as applied to the right of the corporation to terminate the agreement. Counsel for appellant conceded the right of the corporation to terminate the agreement as far as the future was concerned at the time of the hearing or oral argument. However, the trial court below and this court, as shown by the majority opinion, seemed to have ignored the real issue in this appeal which was found in the following allegation of appellant's complaint charging the appellees with "Forcing and accomplishing a breach of contract between Midwest Supply Company and its dealers and sales representatives with the further purpose of destroying Midwest Supply Company and appropriating the dealers, sales representatives, and profits to themselves.

The majority opinion recites:

> "We next proceed to the question of whether the findings sustain the conclusions of law.
>
> "This action was commenced and tried in the court below as an action for damages to appellant because of a conspiracy between the individual

> appellees to cancel the *purported contract Midwest had with the corporation.* (My emphasis). At the outset of his argument appellant asserts 'the uncontradicted evidence clearly establishes an unlawful conspiracy to appropriate plaintiff's property without privilege or justification.' ".

35 It is obvious that the majority opinion is grounded upon a consideration of the purported contract between appellant, Midwest Supply Company, and the corporation, Ortman-Miller Machine Company, Inc., and that it does not give sufficient attention to the allegations of the complaint with reference to the tortious acts of the appellees in destroying the business, that is business contracts and relationships between appellant, doing business as Midwest Supply Company, and his individual dealers and agents. The record glaringly and in bold relief shows that the appellees did just that to the appellant in the instant case. The gravamen of appellant's complaint and evidence is a conspiracy to maliciously destroy a separate business owned by plaintiff. The courts have long recognized that such a cause of action based upon a policy pursued against a trade or business of a menacing character which is calculated to destroy or injure the business of a person is unlawful, and that the person inflicting the wrong is amenable to the injured party in an action for damages, and a continuation of such injuries may be enjoined. *Jackson* v. *Stanfield* (1894), 137 Ind. 592, 36 N.E. 345, 37 N.E. 12; *Shoemaker* v. *The South Bend Spark Arrester Company* (1893), 135 Ind. 471, 35 N.E. 280.

In the case at bar the appellant brought this action in his individual capacity to protect his personal rights. He likewise sued in the name of the Midwest Supply Company, the distributorship owned solely by him. The appellees were sued in their individual capacity and as officers and directors of Ortman-Miller Machine Company, Inc.,

except for the appellee, Thorpe, who was sued individually only. The only way in which the corporation, Ortman-Miller Machine Company, Inc., was brought into this case was upon petition for intervention filed by the appellee-defendant Thorpe. The corporation was only a nominal party, and no relief was sought against the corporation by appellant in his complaint.

36 A careful examination of the findings of the lower court and the majority opinion in this case will disclose that both the court below and the majority opinion give little consideration to the issue formed on the question of the actions of these defendants-appellees in destroying appellant and his business, known as the Midwest Supply Company, and appropriating the dealers, sales representatives, and profits to themselves.

The majority opinion at one point in such opinion states, "We will *hereafter* (my emphasis) refer to the contention that the evidence leads inescapably to the conclusion the appellees sought to destroy the business of Midwest." but where in the *hereafter* of such opinion does it deal with the real issue involved in this appeal? It is touched upon in the following words: "But appellant contends the record herein shows a fraudulent and unlawful plan and scheme to ruin him and his business. With this contention we cannot agree." In support of this conclusion the opinion reasserts that it was lawful to cancel the contract and remove appellant as president, which are matters that must be conceded, but such matters have no bearing upon the real question involved herein. Also, the opinion recites, "Finally, the Special Findings show Midwest represented many firms other than the Corporation. There is no evidence in the record that any of the individual appellees did anything to injure or impair their relations with these other firms." This statement in the

majority opinion obviously refers to other products handled by Midwest besides the cylinders produced by Ortman-Miller. This sidesteps the real issue, which relates to the destruction of the dealers and sales representatives of the Midwest Supply Company. Therefore, I feel constrained to set forth in this dissenting opinion what appears to me to be a definitely evident omission on the part of the trial court and the majority of this court to pass upon the real issue in this appeal, which is: Did

the appellees force and accomplish a breach of con-
37 tract between Midwest Supply Company and its dealers and sales representatives, and appropriate the earned profits of the Midwest Supply Company, with the further purpose of destroying Midwest Supply Company and appropriating such dealers, sales representatives and profits to themselves?

The final paragraph of the majority opinion is as follows: "We are not in this case concerned with a question of whether, after the termination of the Midwest distributorship, the corporation breached contracts it had accepted before such termination." To this statement I would say, "Why not?" The issues in this appeal are definitely concerned with such matter and this paragraph definitely shows that the majority decision ignores it.

The facts of this record lead inescapably to the conclusion that a serious business fraud has been perpetrated upon the appellant. The appellant, as the findings show, with an education in business administration and basic mechanical engineering at Indiana University, Purdue and Indiana Extension, and Armour Institute, started to work for the Pullman-Standard Car Manufacturing Company and progressed rapidly, gaining much experience in tool design, production methods, sub-contract procedures, foundry experience and precision manufacturing methods, and

became acquainted with certain of the appellees who were skilled machinists, and together they formed a job order machine shop with a paid-up capital of $5,000.00. From this original investment the corporation's business grew until it was a half-million dollar business in seven years. In addition, the appellant had built a separate business known as the Midwest Supply Company, starting out with a government license for selling surplus machinery and starting from nothing until the business had been built into a $600,000.00 a year business, with a yearly profit of $45,000.00;

The parties to this litigation were getting along well until certain persons, one of whom is a defendant- appellee herein, Straley Thorpe, and one Harney, an account-
38 ant, who had been hired originally by the appellant, conceived false ideas that Miller's relationships with the Ortman-Miller Machine Company, Inc., were improper and illegal. Both Thorpe and Harney attempted to and did convince the appellee that Miller should be thrown out as president of the company even though he had just been re-elected by such person as president for another year. Miller was denied access to his desk and personal papers in the corporation. These persons even went to the extent of attempting to get him to sign a contract putting up his stock in an obvious move to gain control of his stock.

With this litigation pending, he was rightfully advised by his counsel not to pay the corporation certain accounts due and owing in the regular course of business. The appellees then attempted to tie up his individual bank account, which the Supreme Court of this state held to be improper. Had the appellees merely removed appellant as president of the corporation and ended the working agreement which had been so profitable to all concerned, and had stopped there, the judgment of the lower court

and the majority opinion might be substantiated by law. However, what was subsequently done, and which the lower court and the majority opinion ignores, consists of tortious acts by the appellees which had the effect of harming appellant in his separate business known as the Midwest Supply Company, and the appropriation of the dealers and sales representatives, and certain profits of such business to themselves. And a significant thing, during the time of these difficulties, Harney, the accountant and collaborator with Thorpe, had possession of the books and financial records of the Midwest Supply Company, as well as the Ortman-Miller Machine Company, Inc.

Several secret meetings were held in which Thorpe and the other appellees participated. The only reasonable inference to be drawn from such meetings and the activities carried on by the appellees, as shown by the record in this case, was that Thorpe and Harney were attempting to create, and did create, a false impression upon
39 which the other appellees acted, that Miller had been doing improper and illegal things which the record, in my opinion, fails to substantiate. As a result of these circumstances the parties, not being content in attempting to deprive appellant of his interest in the corporation, set about to destroy him personally and to bring about breaches of contracts between his separate business, the Midwest Supply Company, and its dealers and representatives. Wires and telegrams were sent by the appellees and by Thorpe to cancel and appropriate purchase orders which had already been secured and sold by the Midwest Supply Company and that were pending or placed with Midwest prior to February 26th. The appellees just appropriated such purchase orders and sent them directly to the customer. The appellees took Midwest purchase orders and instead of invoicing them to Midwest invoiced them

directly to the customer. It is significant to note that this action of the appellee was in direct violation of the re-restraining order issued by the lower court.

The appellant Miller was the sole owner and proprietor of the Midwest Supply Company, which was a machine tool and accessory distributor, having dealers and sales representatives located in various industrial areas throughout the United States and Canada. As such distributor it purchased and sold through its dealers and representatives various types of machine tools, accessories and allied equipment. Appellant was an existing independent distributor when the first cylinder was produced by Ortman-Miller Machine Company, Inc., in February of 1948. The Ortman-Miller Company had no manufactured product of its own until the cylinder, and consequently no immediate existing way to sell its product except through existing machine tool distributors. Alva Ortman and Carl Speichert were machinists, not salesmen, when the product was first manufactured, and the first inquiry received by Ortman-Miller for a cylinder was referred by the secretary, appellee Speichert, to Midwest Supply Company and its existing salesman in the Cleveland area, one P. W. Rice.

The appellee Thorpe, in collaboration with Harney,
40 conveyed the impression to the other appellees that there was something wrong or illegal for the company to contract with Miller as long as he was an officer and director of the corporation. This impression was entirely false and contrary to the law with reference to agency distributorship contracts by corporation officers. The Supreme Court, in *Wainwright* v. *P. H. & F. M. Roots Co.* (1912), 176 Ind. 682, 97 N.E. 8, stated:

> "Contracts for the loan of money by a director to his company, and contracts for personal services to it which are outside the scope of his duties as an

officer are generally upheld as valid, when such contracts are open and otherwise free of blame. • • •

"So the general rule seems to be that where the contract between a corporation and one of its directors is made on the part of the company by a majority of the directors acting for its interests honestly and in good faith, and with full knowledge of the matter, or by another independent agent with authority to act for it, such contract is not even voidable, except for unfairness or fraud, for the presence of which courts will scrutinize the contract."

In February 1952 appellant became president of the Ortman-Miller Machine Company, Inc. He set up numerous distributors for the sale of such cylinders and also acted as a separate distributor under the firm name and style of Midwest Supply Company, which also handled other products. None of the various distributors had formal written contracts with the corporation, but each had a clearly defined geographical area in which to operate. All of appellant Miller's dealing with the Orman-Miller Machine Company, Inc., were open and above board and the Midwest Supply Company received the same thirty per cent commissions as the other distributors for the sale of the product. In fact, the record shows that he handled some 7,500 purchase orders at the same rate of commission made to the other distributors. It is also significant to note that the undisputed facts of the record show that all checks ever drawn on the Ortman-Miller corporation account had to be countersigned by two of the following three persons: Miller, Speichert or Alva Ortman. This evidence tends to refute the lower court's findings 2
41 and 3 that the appellee relied upon the appellant to look after *all* the business affairs of the corporation.

Furthermore, after Thorpe and Harney, in the various meetings they held with appellees, suggested wrongdoing on the part of appellant Miller, at Harney's suggestion,

the funds of the corporation were withdrawn by Alva Ortman and Speichert and re-deposited at the Hoosier Bank, subject to signatures of Alva Ortman and Speichert alone. In this maneuver Miller was deprived of the right to countersign checks or to see what was done with the corporation's money. He was prohibited from having an attorney present at meetings held by the appellees, which points up the fact that they wished to avoid the throwing of any legal light on their machinations by any competent legal advisor of appellant. With reference to the question of the alleged conspiracy as shown by the notes and testimony of the various meetings held by appellees and Harney, it must be borne in mind that proof of conspiracy may arise from circumstantial evidence by reason of the fact that secrecy and concealment are inherent characteristics of a conspiracy to perpetrate a fraudulent or other tortious act. As the Supreme Court stated in *Roberts* v. *State* (1920), 188 Ind. 713, 124 N.E. 750:

> "A conspiracy can seldom be made out by direct evidence, consequently, the necessity for the rule permitting it to be established by circumstantial evidence or by isolated and independent facts."

It was stated in *Montgomery* v. *Crum* (1928), 199 Ind. 660, 161 N.E. 251:

> "Direct evidence of a conspiracy can seldom be obtained, and, for that reason, it is well settled that conspiracy may be shown by isolated and independent facts. *Cook* v. *State* (1907), 169 Ind. 430, 82 N.E. 1047; *Roberts* v. *State* (1919), 188 Ind. 713, 24 N.E. 750. Under this rule, authorizing the finding of a conspiracy upon circumstantial evidence alone, the field of inquiry is broadened to allow the trial court a wide discretion in the admission of evidence showing the relation the parties to the conspiracy bear to each other, their interest in the success of the act to be accomplished, or the motive for its forma-

tion. *Moore* v. *Shields* (1889), 121 Ind. 267, 23 N.E. 89. 'Any joint action on a material point, or collocation of independent but co-operative acts, by persons closely associated with each other, is held to be sufficient to enable the jury to infer concur-
42 rence of sentiment,' 2 Wharton, Crim. Law (9th ed), § 1398."

This record shows without dispute that the dealers and agents of the Midwest Supply Company distributorship were coerced to break their contracts and the existing purchasing orders were confiscated. From the record of the testimony of the appellee, Speichert, the following questions and answers appear:

"Q. At that time Midwest Supply Company had on order thousands of dollars' worth of material with Ortman-Miller Machine Co.?

"A. Yes.

"Q. What were you going to do with those purchase orders then on file when you voted to accept no further orders?

"A. For a while we didn't do any billing, we had to decide whether to take care of the customers or disregard them.

• • • •

"Q. And the purchase orders that were pending or placed with Midwest prior to February 26th, you filled and sent directly to the customer, didn't you?

"A. Yes.

"Q. You took Midwest purchase orders and instead of invoicing them to Midwest you invoiced them directly to the customer?

"A. Yes.

"Q. You did that after March 13, 1952, also?

"A. I don't recall the exact date.

"Q. The records would show that?

"A. Yes.

"Q. Was the question of the restraining order discussed in your presence?

"A. Yes.

"Q. What did the discussion consist of?

"A. I think our attorney can answer that.

"Q. Were you advised to ignore the restraining order? I want to know from you.

"Mr. Thorpe: I object to that, it would be a confidential communication.

• • • •

43 "Q. The question is what was said between you and Mr. Thorpe and Thorpe and any of the other defendants in this lawsuit, with reference to filling orders of Midwest Supply Company and invoicing them to the customers direct and filling orders placed with you directly by the dealers and representatives of Midwest Supply Company.

• • • •

"A. We were advised by our attorneys that that was the proper thing to do, to fill whatever orders that were necessary, the stock was building up on our floor—so it was decided that we could go ahead and ship and bill direct.

• • • •

"Q. When you say we decided it, did you get together and decide on advice of counsel to make these shipments?

"A. Yes.

"Q. All of you decided to do it, is that right? This is a contempt matter and it is serious to the plaintiff. I want to know the circumstances under which you made these shipments and I want to know whether you and the three Ortmans who were the remaining owners of the company, other than Miller, jointly decided to do that very thing.

"A. We decided to ship orders on advice of counsel.

"Q. All of you did?

"A. Yes."

In this process of confiscation of orders, Alva Ortman, as president of the Ortman-Miller Machine Company,

Inc., wrote to Midwest's representative in Toronto, Canada, one Neil Groom, "No orders will be recognized that have been processed through the Midwest Supply Company. Any current outstanding orders • • • must be reaffirmed on your letterhead or sales order blanks and the ultimate consumer advised of the change." Thorpe told Gilmore, the Detroit representative of Midwest Supply Company, that Miller would possibly end up in jail, and Gilmore stated that he was forced to reorder pending orders for his customers' sake. This is typical of the orders and telegrams sent to Midwest dealers and representatives, which I shall not unduly extend this opinion to set forth.

Reference is made in the majority opinion to a conversation between Thorpe and the appellant, in which Thorpe suggested that appellant postpone a vacation in Florida and that certain matters of difficulty might be worked out, and he suggested that the boys (appellees) were upset. A careful scrutiny of the record discloses that regardless of Thorpe's idea as to how badly the appellees were upset, two days thereafter they elected appellant president of the corporation for another year. Also, much is made of the income tax problems of the corporation as justifying the actions taken by the appellees. A careful examination of this matter will show that neither the appellant or appellees were accountants or attorneys, and that the action taken at Harney's suggestion for a change from a cash to an accrual basis was an accounting change, and the record is devoid of any evidence that the appellant and appellees were in any actual difficulties with Federal tax authorities regarding this matter.

The record shows that Alva Ortman, Nelson Ortman and Speichert all cooperated in specific acts in the process of the appropriation of these pending orders of Midwest Supply Company. The appellees, under Thorpe's direction, appropriated the proceeds of purchase orders between Midwest and its dealers and Midwest and its customers by invoicing Midwest dealers and customers directly, using Midwest purchase orders which the corporation had accepted and filled. The corporation dollar volume of these purchase orders so appropriated was $130,663.89, as shown by appellant's accounting exhibits included in the record in this case and referred to in appellant's brief. It is difficult to understand how the trial court or this court on appeal can ignore the facts of those accounting exhibits.

The judgment in the instant case should be reversed by reason of the trial court erroneously failing to find facts established by the clear admissions and testimony of the defendants-appellees which established an unlawful plan and conspiracy to commit the malicious acts complained of, and the tortious acts committed pursuant to the plan which appellant was entitled to have enjoined as well as damages therefor. *Central Pharmacal Co.* v. *Salb* (1939), 106 Ind. App. 495, 13 N.E. 2d 875; *First Nat. Bank* v. *Farmers, etc., Bank* (1908), 171 Ind. 323, 86 N.E. 417.

For the reason given in this opinion, Finding numbered 18 is not supported by the evidence, as well as Findings numbered 2, 5, 7, 9, 10, 12, 17 and 19.

Also, it appears to the writer of this opinion that the court also erred in its conclusions of law and in overruling appellant's motion for a new trial, and this cause should be reversed.

Dissenting Opinion on Petition for Rehearing.

In the majority opinion on petition for rehearing this court holds that the appellant's petition for rehearing cannot be considered for the reason that it fails to comply with Rule 2-22, Rules of the Supreme Court. In support of such holding the majority of this court sets forth that the petition is combined with argument and cites the case of *Reed* v. *Kalfsbeck et al* (1897), 147 Ind. 148, 157, 46 N.E. 466. The petition in the instant case very clearly sets out wherein the appellant claims the lower court erred in its decision, and in addition thereto argument is also contained in such petition and is a part thereof. In the *Reed* case, *supra,* the court held that a petition for rehearing which was argumentative only and did not state any particular cause or errors by reason of which the decision of the court was claimed to be erroneous, should not be considered. That is not the situation which exists in the case at bar, and while under proper practice it would have been better if appellant had included the surplus argumentative material in a separate brief, it seems clear to me that the appellant is entitled to have his petition for rehearing considered, which the majority opinion on rehearing flatly states *cannot be done.*

The additional cases set forth in support of the holding of this court in refusing to consider the appellant's petition for rehearing are all cases in which the petition for rehearing does not set forth the specific causes for which it is claimed the judgment of the court is claimed to be erroneous. In this case the appellant in his petition for rehearing has set forth with great care, and particularly the specific causes for which the judgment is claimed to be erroneous, both in the lower court and in this court on appeal, which the majority opinion dismisses a consideration of the petition with the statement that

47 the "appellant has filed a verbose and redundant manuscript of 33 pages. It is largely a general rehash of his argument referred to in our original opinion as his conclusions of what the evidence proves, the credibility of witnesses, and numerous misstatements and half truths as to the record herein."

In addition, the majority opinion on petition for rehearing, without discussing or considering the points raised by the appellant in his petition for rehearing, makes an argumentative attack upon the dissenting opinion which has been filed in this case. It is stated in this majority opinion on petition for rehearing that "There is no evidence set out by appellant in his original brief or in the dissenting opinion to indicate that appellees, in exercising their right to sell their product, resorted to false, scandalous or tortious language or conduct toward appellant." The facts set forth in the dissenting opinion, in the briefs, and in the record in this case, as contained in Plaintiff's Exhibit No. 30, admitted and read in evidence, being the deposition of Charles N. Gilmore, page 297 of Volume 2 of Appellant's brief, are as follows:

"Q. Was any statement made to you by Mr. Thorpe, or by Mr. Ortman, at the time of this visit, that they were about to have Mr. Miller put in jail?

"A. I don't recall that they were going to have him put in jail.

"Q. Would you say no such statement was made?

"A. Well, during the conversation they said there was a possibility because of the way that business had been conducted.

"Q. Who made that statement; which one of those gentlemen?

"A. I think Mr. Thorpe made the statement.

"Q. And you informed Mr. Miller of that, when you had a talk with him?

"A. I believe I did. It runs in my mind that I did. I was not covering up anything, because we had always worked very frankly together."

48 This is typical of the various acts and conduct of the appellee toward Miller as shown by the evidence, and it is difficult to understand how it can be said that this did not constitute false, scandalous and tortious language and conduct toward appellant.

Without belaboring this matter further, which is fully covered in the dissenting opinion, I feel a duty to point out that in my humble opinion the lower court and this court on appeal has not given consideration to the violation of the corporation's implied contract when it cancelled orders already entered, and the legal effect of the voluminous accounting exhibits. There is no question that the corporation had the legal right to refuse to accept future orders, but the majority opinion completely ignores the action of the appellees, nor has a decision been made in the lower court nor a consideration been given in this court to the question which was clearly set forth in the issues and the evidence in this case as to whether the appellee forced and accomplished a breach of contract btween Midwest Supply Company and its dealers and sales representatives and appropriated the earned profits of the Midwest Supply Company, with the further purpose of destroying Midwest Supply Company and appropriation such dealers, sales representatives and profits to themselves.

The majority opinion on rehearing states that the corporation had the right to refuse to accept future orders. As to this point there can be no dispute. However, it appears to me that the majority opinion ignores the undisputed evidence of the violation of the implied con-

tract with the Midwest Supply Company and the tortious acts of the individual appellees shown by the evidence, the briefs and the record in this cause.

I respectfully feel that the petition for rehearing would have been sustained, and in any event, for the reasons given herein, I feel that the majority opinion on the petition for rehearing is wrong in refusing to consider appellant's petition for rehearing.

Findings of Newton Circuit Court in Disbarment Action.

49 IN THE NEWTON CIRCUIT COURT
JANUARY TERM, 1955.

Clarence H. Harney,
Relator,

vs.

Owen W. Crumpacker,
Respondent.

Cause No. 13485

State of Indiana, County of Newton ss.

FINDINGS AND DECREE

This cause having come on for hearing, and the Court having heard the evidence on October 26th and on October 29th, and having, by agreement of the parties, heard argument in the cause during vacation and on December 17th, 1954, and having taken the matter under advisement and being duly advised in the premises, now finds:

1. Clarence H. Harney, an attorney-accountant, filed this action in the Lake Superior Court Room No. 1, against Owen W. Crumpacker, a practicing lawyer of Hammond

and a member of the Bar of the Supreme Court of Indiana, to disbar him through the revocation of his license to practice law issued by the Supreme Court of Indiana in January of 1939. The complaint, filed on September 20th, 1954, takes the form of a civil action. It was drafted, apparently, under the Acts of 1881 (Burns', Section 4-3614, 4-3617, and 4-3618). Harney charges that defendant Crumpacker, in a motion for new trial filed on behalf of his client, falsely accused Harney of being a convicted felon. The motion relied on was filed two years and two months earlier in civil litigation then pending in the Jasper Circuit Court and in which litigation Crumpacker represented the plaintiff, J. Carter Miller. Crumpacker filed answer to the disbarment charge admitting the preparation and filing of the motion for new trial but denying any falsity in the maters set forth in the motion. On these issues, the cause was venued
50 from Lake County to this court for trial.

2. The pertinent part of the motion for new trial filed in the Jasper Circuit Court on July 30th, 1952, in an action entitled J. Carter Miller vs. Alva Ortman, et al, Cause No. 33-52, reads as follows:

> "7. Newly discovered evidence material for the party applying, which he could not, with reasonable diligence, have discovered and produced at the trial, to-wit:
>
> Following the conclusion of the trial, plaintiff upon checking, learned that one of the witnesses, Clarence Harney, had a criminal record in Chicago. He was found guilty on March 15, 1948, of passing bad checks, a felony. Judge Dougherty of the Cook County Criminal Court, placed him on probation. He later came to Hammond and occupied an office with C. Ballard Harrison, a lawyer, and also a convicted felon. Unknown to the plaintiff and not discovered until July 21, 1952, one Scott Cuthill, the office

manager of plaintiff, in his business at 704 Wentworth Avenue, Calumet City, Illinois, had been collaborating with Harney and the defendant's attorney, Straley Thorpe, throughout and prior to the trial. Cuthill privately collaborated with Harney in perpetrating the frauds upon the plaintiff described in the complaint. Being in a fiduciary position and completely in confidence with the plaintiff, Cuthill was in a position to secrete evidence from the plaintiff which he might have produced at the trial. Illustrative of his conduct is a letter discovered by the plaintiff and attached hereto as Exhibit 'A'. Of recent date, as plaintiff is informed and believes the fact to be, Cuthill received a large sum of money from the defendants for his assistance in collaborating to defraud plaintiff. Had the court been fully informed as to the criminal record of Harney, his collaboration with Cuthill, Thorpe and Harrison, the court would not have written into the findings the hearsay statement of Harney as written by co-conspirator Thorpe."

The motion was accompanied by an affidavit executed by Miller's attorney in the above litigation, Crumpacker, in accordance with Burns', 2-2404.

Harney was a witness in the case previously tried by the Jasper Circuit Court (in which findings adverse to Miller were entered on June 3, 1952. Attorneys Straley Thorpe and C. Ballard Harrison, of Hammond, were co-counsel for the defendants in the case. In addition, Straley Thorpe was a party defendant. The other defendants were Alva, Nelson and Harold Ortman, and Carl Speichert.

Scott Cuthill was a witness at the trial.

51 4. Prior to the commencement of the trial of Cause No. 33-52 in Rensselaer on March 31, 1952, C. Ballard Harrison had been convicted of perjury in the Lake Criminal Court. During the trial he was out on bond pending an appeal to the Supreme Court of Indiana. Subse-

quent to the trial, his conviction was affirmed by the Supreme Court, and he was sent to the penitentiary. Harrison was then disbarred in an original proceedings in the Supreme Court filed by the Disciplinary Commission under Rule 3-21 of the Supreme Court. Attorney James J. Richards of Hammond, who appears for Harney in these proceedings, joined Thorpe as co-counsel in the litigation at Rensselaer after Harrison went to the penitentiary. The case has been pending in the Appellate Court of Indiana on appeal since June 19th, 1953, under Cause No. 18459. Thorpe and Richards appear as attorneys for the appellees. Crumpacker is the lawyer for appellant Miller.

5. The trial of Cause No. 33-52 at Rensselaer consumed ten days over the period from March 31st through April 14th, 1952. Miller, the plaintiff in the action, sought injunctive relief against alleged malicious interference with his distributorship, Midwest Supply Company, and the confiscation of his corporate stock, right to $175,000.00 in undistributed profits, and other interests in Ortman-Miller Machine Company, Inc., a manufacturing concern. It was charged in the complaint that Thorpe, the corporation attorney, in violation of his fiduciary duties to the corporation, had fostered the conspiracy to confiscate Miller's interests, Miller, being President, a director, and shareholder of the corporation.

At the trial at Rensselaer it developed that Harney, the corporation accountant, brought into the corporation in this capacity by Thorpe ten months before, had secretly met in Thorpe's office Sunday morning, February 17th, 1952, at a meeting called by Thorpe during Miller's absence on a vacation in Florida. At this secret meeting,
52 Thorpe took notes which he was subsequently compelled to surrender at the trial. These notes recited

that Harney told Miller's associates at the Sunday morning meeting, that:

(1) Miller, the corporation president, had juggled the books.

(2) Miller had 125 G's (meaning thousands) which were in his own account instead of the company's account.

(3) They (Miller associates) could be prosecuted by the United States Government because of Miller's derelictions.

Neither Miller nor his attorney, Crumpacker, were present at or aware of the secret meeting of February 17th, 1952, or the connection between Thorpe, Harney and Harrison when Harney was subpoenaed as a witness by Miller, to bring the company's books on April 4th, 1952. When he took the stand to testify at Rensselaer, Harney knowingly concealed from the Jasper Circuit Court the fact that he was living with (and had been since the fall of 1948) defense counsel Harrison at 16 Highland Street, Hammond. He likewise, concealed from the court the fact he was officing with Harrison. He gave a Hobart address when asked about the place of his residence.

6. Because of Harney's conduct on the witness stand, Miller's attorney, Crumpacker, became suspicious of Harney and vigorously questioned him later in the library about the Thorpe notes of the Sunday morning meeting in which Thorpe presumably wrote the contents of Harney's Statements. Crumpacker then suggested to Miller that an investigation be made into Harney's background. Such an investigation was made through the Credit Bureau of Hammond, Ind. and Captain Andrew Pellar, Chief of Detectives and Assistant Chief of Police of the Hammond Police Department. Both the Credit

Bureau and Pellar informed Miller and Crumpacker
53 that Harney had the criminal record described in the motion for new trial. Harney's background, his connection with defense counsel, Harrison, as well as his association with Cuthill were not learned of by the plaintiff until after the conclusion of the trial on April 14th, 1952.

7. The newly discovered evidence set forth in the motion for new trial was obviously material and relevant to the matters in issue.

8. As to the alleged falsity of the newly discovered evidence, Harney was the only witness offered in this case to support his verified complaint. His testimony on direct examination was limited to a contention that he was not convicted of passing a bad check by Judge Dougherty of the Cook County Criminal Court on March 15, 1948, or any other time. Over strenuous objection by his counsel he admitted coming to Hammond and officing with C. Ballard Harrison, since convicted of a felony, and co-counsel with Thorpe in the trial at Rensselaer, and living with Harrison, both before, during and after the trial, and working with said Cuthill. He, likewise admitted attending the secret Sunday morning meeting with Thorpe at which he made the statements copied by Thorpe and referred to in the motion for new trial.

9. Under all the evidence in the case, the Harney charges in the complaint are improper and not supported by any credible evidence; and the matters set forth in the motion for new trial filed in the Jasper Circuit Court on June 30, 1952, as newly discovered evidence are true, and supported by ample credible evidence in this case.

10. At the time these charges were filed on September 20th, 1954, Thorpe and Harney were cross-defendants in

a civil action for damages for fraud pending in the Jasper Circuit Court under Cause No. 43-52. Richards and Thorpe appear as attorneys for all cross-defendants. Miller, 54 and cross-complainant, is represented by attorney Crumpacker in the proceedings. In addition, a minority stockholder's suit, Miller vs. Alva Ortman, et al, is pending in this court under Cause No. 13320. Miller is represented by attorney Crumpacker and the defendants by Thorpe and Richards. In two other pending cases in this court, No. 13458 and No. 13446, Miller, as plaintiff, is represented by Crumpacker and the defendants represented by Thorpe and Rchards. Thorpe and Harney are party defendants in Cause No. 13446, supra. Again, the fraud claim in the Circuit Court of Appeals in Chicago had been set for argument on September 29, 1954, when the Harney charges were filed and publicized on September 20, 1954, as hereinbefore stated. Harney and Cuthill are material witnesses in the pending litigation.

12. The facts hereinabove related make it clear that the filing of this complaint and its subsequent prosecution constitute an abuse of the disbarment procedures.

On the facts thus found,

It is therefore ordered, adjudged and decreed, that plaintiff have and recover nothing on his complaint, and that defendant recover his costs taxed at $..... Dollars..

All of which is adjudged by the court this 17th day of January, 1955.

/s/ Newell A. Lamb
Judge of the Newton Circuit Court

OPINION OF THE SUPREME COURT IN INJUNCTION SUIT.

55 THE STATE OF INDIANA,
IN THE SUPREME COURT,
MAY TERM, 1956

On the 12th day of July, 1956, being the 39th Judicial day of said May Term, 1956.

No. 29455

Hon. Frederick Landis, Chief Justice, Hon. Harold E. Achor, Hon. Norman F. Arterburn, Hon. James A. Emmert, Hon. Arch N. Bobbitt, Associate Judges.

In The Case of J. Carter Miller, both individually and d/b/a Midwest Supply Company.

Appellant,

vs.

Alva Ortman, Both Individually and as a Director and/or Vice President of Ortman Miller Machine Co., Inc., Carl Speichert, both individually and as Director and/or Secretary-Treasurer of Ortman-Miller Machine Co., Inc. Harold Ortman and Nelson Ortman, both individually and as Directors of Ortman-Miller Machine Co., Inc., an Indiana Corporation; Straley Thorpe and Ortman-Miller Machine Co., Inc.,

Appellees.

Come the parties by their attorneys and the Court being sufficiently advised in the premises, gives its opinion and judgment as follows, pronounced by

Transferred from the Appellate Court under Section 4-215, Burns' 1946 Repl.

(No. 18459)

Landis, C. J., Arterburn, Bobbitt and Emmert, JJ., concur.

ACHOR, J.

56 This is an action for the malicious destruction and appropriation of a business operated by appellant J. Carter Miller, d/b/a Midwest Supply Company. A judgment for the appellees was affirmed by the Appellate Court. At the outset, we are confronted with the contention that transfer to this court should be denied for the reason that the petition for rehearing filed in the Appellate Court did not conform to Rule 2-22 of this court. The issue is significant because of the fact that the filing of a valid petition for rehearing in the Appellate Court, asserting the errors relied upon, is a condition precedent to the granting of a transfer in this court. However, under the circumstances of this case, the issue of the right of this court to consider the case on petition to transfer is dependent upon the answer to two questions: (1) Was the petition for rehearing so defective as to warrant its total rejection by the Appellate Court? (2) Did that court, by discussing the issues presented by the petition, in an opinion supplemental thereto, in effect waive any defects in the form of the petition?

We will first consider that sufficiency of the form of appellant's petition for rehearing. Rule 2-22 provides in part as follows: "Application for a rehearing of any cause shall be made by petition, separate from the briefs, * * * stating concisely the reasons why the decision is thought to be erroneous * * *."

On examining the petition, it is apparent that the petition was not made and filed under separate cover from the briefs. Was this failure, in itself, sufficient cause for refusing to consider either the petition or the argument in support thereof? Although Rule 2-22 merely states that the application shall be *made* by petition, separate from the briefs, and does not expressly state that the

petition and briefs shall be *filed* under separate cover, we consider such to be the intention of the rule. Therefore, the first question we must decide is whether such
57 failure is cause for arbitrary rejection of the pleading in toto. Appellees contend that it is and, in support of their position, cite the cases of *Terre Haute, etc., Traction Co.* v. *Scott* (1930), 91 Ind. App. 690, 170 N.E. 341, 172 N.E. 659, and *The Baltimore, etc., R. W. Co.* v. *Conoyer* (1897)), 1949 Ind. 524, 48 N.E. 352, 9 N.E. 452. In each of these cases the court held that the petition for rehearing presented no issue because of the failure to conform to a similar rule. However, an examination of each of these cases discloses that the "petitions" consisted only of a reargument of the respective cases on their merits, without the benefit of any concise statement of the reasons why the respective decisions were thought to be erroneous. Clearly, a "petition for rehearing' so drafted presents no issue any more than would the argument portion of a brief without an assignment of errors.

However, we are here presented with a different situation. The petition as drafted first sets forth in "summary" form the numerous particulars wherein appellant asserts that the decision of the Appellate Court was erroneous. His "summary" of the petition for rehearing gives the page number within the petition where each of said summarized errors is again stated in condensed form, separate from and followed by an argument in support thereof.

Under the circumstances presented, was it proper for the Appellate Court to refuse to consider the petition for rehearing because of appellant's failure to file his petition and briefs under separate cover, even though certain of the grounds relied upon for rehearing are clearly and consisely stated in rhetorical form, separate from the

argument in support thereof? In answering this, we are confronted with these considerations: (1) The fact that the proceedings is already before the court, and therefore the form of the petition is not jurisdictional: (2) the declared policy of both the legislature (1) and our court (2) is to liberally construe our rules of pro-
58 cedure to the end that, where possible, litigants may have their cases determined upon the merits.

Under the circumstances presented, we are of the opinion that we should be guided by the test as to whether appellant has made a goodfaith effort to comply with the rule. (3) We judicially know that heretofore our courts have considered numerous cases on petition for rehearing and briefs in suppor thereof have been composed separately but filed under a single cover, although the issue has not heretofore been specifically raised. Because of this practice in which our courts have acquiesced, and because the rule does not expressly exclude the construction which appellant gave it, we cannot say that appellant did not make a goodfaith effort to comply with the actual intent of the rule. Because of the complexity of issues in this appeal many issues are raised in the petition for rehearing. It is a fact that, in some instances, the reasons relied upon are not concisely stated separate from the argument. They are therefore ignored. However, in those instances where the reasons relied upon are concisely stated in rhetorical (form) separate from the argument in support of the particular issue, such reasons should have been considered by the Appellate Court.

However, even though we were to conclude, as did the Appellate Court, that because "* * * appellant's petition wholly fails to comply with the rule * * * therefore * * * it cannot be considered," (4) we are [illegible] by the fact that said court nevertheless did

"amplify" upon its original opinion and entered into a discussion of the very reasons asserted by appellant in his petition for rehearing as to why he thought the decision to be erroneous, which reasons are concisely stated in rhetorical form, separate from the supporting argument. For example, the court, in its supplemental opinion, for the first time alluded to the issue of appellees'

59 ("• • • false, scandalous or tortious language or conduct toward appellant."(*) The court also considered the cases of *Shoemaker* v. *South Bend Spark Arrester Co.* (1893), 135 Ind. 471, 35 N.E. 280, 22 L.R.A. 332, and *Jackson* v. *Stanfield* (1894) 137 Ind. 592, 36 N.E. 345, 37 N.E. 14, which appellant asserted the opinion of the Appellate Court contravened. By discussing these issues which go to the merits of the case, without first withdrawing the original opinion, it must be considered for the purpose of transfer to this court that defects in the form of a petition for rehearing were, in fact, waived as to these issues actually presented therein and discussed in the court's supplemental opinion.

We therefore proceed to consider the case upon its merits. Among the alleged errors stated in the petition for rehearing, and now asserted as cause for transfer, is the failure of both the trial court and the Appellate Court to comprehend the theory of the action as an action for injunctive relief against the malicious destruction and appropriation of appellant's separate and lawful business. Appellant asserts that this failure is apparent from the opinion of the Appellate Court, which expressly misdescribes the action as charging appellees "• • • with having conspired to unlawfully force a *breach of a certain contract* between Midwest (appellant) and the Corporation (appellees). • • •" (*) (Our italics.) Appellant also asserts that this failure of the trial court

For all footnotes—see page 95

to comprehend the theory of the action is made apparent from the findings of fact and conclusions of law which the court both stated and failed to state.

Also, as heretofore stated, appellant asserts that the decision of the Appellate Court contravenes the ruling precedent of this court, relative to injunctive relief against tortuous destruction of a business, as established in the cases of *Jackson* v. *Stanfield, supra,* and *Shoemaker* v. *The South Bend Spark Arrester Co., supra.*

60 We now proceed to consider upon the merits the above issues presented by appellant's petitions for rehearing and transfer. We begin with a statement as to the nature of the action: As heretofore stated by appellant in his petition for rehearing, this is an action brought by appellant, as an individual and as sole proprietor of Midwest Supply Company (hereinafter referred to as "Midwest"), in the Lake Circuit Court, against appellees Alva Ortman, Carl Speichert, Nelson Ortman and Harold Ortman, individually and as officers and directors of appellees Ortman-Miller Machine Company, Inc. (hereinafter referred to as the "Corporation") and appellee Straley Thorpe, as an individual. Appellee "Corporation" was granted leave to intervene as a party-defendant. The action is in equity for an injunction and damages because of the alleged acts committed pursuant to conspiracy by the appellees, as individuals and officers of the "Corporation", to tortuously destroy appellant's separate business as Midwest Supply Company, and to appropriate that business for their mutual benefit.

The primary tortuous acts allegedly committed by appellees, in the consummation of such conspiracy, are as follows: (a) Deposing appellant as President of the "Corporation" and appropriating his salary and income therefrom; (b) forcing and accomplishing a breach be-

tween "Midwest" and its dealers and sales representatives, with the further purpose of destroying "Midwest" and appropriating said dealers, sales representatives and profits to themselves.

Special findings of fact and conclusions of law were requested and stated by the trial court. The findings as stated contained many evidentiary facts and conclusions of fact and law which are improper. However, because the issues which we must consider in deciding this case deal largely with these evidentiary facts, ultimate facts and conclusions of fact and of law, they are hereinafter set out in full:

—1—

61 "Plaintiff, J. Carter Miller, filed this action in the Lake Circuit Court at Crown Point, Indiana, on March 13, 1952. He brings the action in his individual capacity and as the sole owner and proprietor of a business carried on by him under the firm name and style of Midwest Supply Company, 706 Wentworth Avenue, Calumet City, Illinois. The Midwest Supply Company (hereinafter referred to in these findings as 'Midwest') is a machine tool and accessory distributor with dealers and sales representatives located in various industrial areas throughout the United States and Canada. As such distributor it purchases and sells, through its dealers and representatives, various types of machine tools and accessories, and allied equipment. In addition to the relief sought individually and as owner of 'Midwest,' Plaintiff seeks incidental and ancillary relief and protection in equity for his rights as President, Director and shareholder of an Indiana corporation known as Ortman-Miller Machine Company, Inc., 1222 - 150th Street, Hammond, Indiana. Ortman-Miller Machine Company, Inc., hereinafter referred to in these findings as the 'Corporation,' was incorporated in 1945 with fifty shares of no-par common stock outstanding, owned (except for a brief period following incorporation) in equal shares (ten

shares each) by plaintiff and defendants Alva Ortman, Nelson Ortman, Harold Ortman and Carl Speichert. It operates a machine shop, and manufactures for sale upon the open market machined metal parts for use in the machine tool industry. Since January of 1948 its principal product has been a machined pneumatic and hydraulic cylinder for use in providing reciprocating motions in industrial and farm machines of many types. In addition to the manufacture of cylinders, it does machine shop work, from time to time and to a limited extent, under contract for other manufacturers of metal machine tool products. The 'Corporation' was made a nominal defendant and summons issued and served upon it although no relief was or is sought against it in the complaint. In addition, on March 17, 1952, through defendants Straley Thorpe and Alva Ortman, an ex parte order was obtained in the Lake Circuit Court making the 'Corporation' a party defendant. Plaintiff, J. Carter Miller, individually and defendants Alva Ortman and Carl Speichert were the original incorporators of the 'Corporation' and its first stockholders, officers and directors. Some time after its incorporation, defendants Harold Ortman and Nelson Ortman became stockholders, through a transfer of ten shares each from their brother, Alva Ortman, who originally owned 30 shares of stock. Upon receiving the stock, defendants Nelson Ortman and Harold Ortman were made, by mutual agreement and common consent, directors of the 'Corporation.' Thus, since prior to the production of the cylinder in 1948 plaintiff and the defendants Ortmans and Speichert have been the sole stockholders and directors of the 'Corporation' for approximately three years prior to March 12th, 1952.

—2—

Plaintiff Miller was educated in business administration and basic mechanical engineering at Indiana University, Purdue and Indiana Extension, and Armour Institute. In February of 1940 he obtained employment at the Pullman-Standard Car Manufacturing
62 Company, in Hammond, which company was manu-

facturing ordnance material for the British and American governments, and produced considerable quantities of ordinance material for the armed forces during the last war. Starting out as a beginner inspector, he worked up to general foreman and coordinator between quantity and quality production at the time he left Pullman-Standard in January of 1945. During the period of this employment he gained experience in tool design, production methods, subcontract procedures, foundry experience, and precision manufacturing methods. Having become acquainted with defendant Alva Ortman during the early fall of 1944, he left Pullman-Standard to form the Ortman-Miller Machine Corporation, Inc. Plaintiff invested One Thousand Dollars ($1,000.00) cash, defendant Speichert one Thousand Dollars ($1,000.00) cash, and defendant Alva Ortman small lathes, drill presses, a milling machine, and small tools (valued at $3,000.00 by the incorporators) as the paid-in capital. These incorporators became the Corporation's first Board of Directors, and its President, Secretary-Treasurer, and Vice President, respectively. The building at 1222-150th Street was rented as the factory premises. Plaintiff solicited job orders and handled the administrative work of the 'Corporation,' while defendants Alva Ortman and Speichert, skilled machinists, operated the machines. When defendants Nelson Ortman and Harold Ortman were released from the army service, they were given ten shares of stock each by Alva Ortman, made directors of the corporation, and put to work on the machines. That the defendants Alva Ortman, Carl Speichert, Nelson Ortman were mechanics and machinists and were not familiar with business administration and relied upon the plaintiff, J. Carter Miller, to look after all the business affairs of the corporation.

—3—

That some time in 1946, J. Carter Miller obtained a license from the Federal Government to sell surplus government machinery and thereafter and until

late in the year of 1947 when sales of surplus machinery came to an end, the said Miller sold surplus machinery, either personally or through various persons to whom he paid a part of his commission. Sometime between these dates, the said J. Carter Miller took the trade name of Midwest Supply Company and was the sole proprietor of the business done under said name. That said Miller established an office in Calumet City, Illinois, at 706 N. Wentworth Avenue in space occupied by one Louis Bierman, a general accountant, who was employed by Ortman-Miller Machine Company, Inc.

—4—

That during the year 1948, arrangements were made for the manufacture of hydraulic and pneumatic cylinders in the Ortman-Miller Machine Company, Inc. plaint at 1222--150th Street, Hammond, Indiana.

—5—

That during all of the time set out herein and until February 19, 1952, the plaintiff, J. Carter Miller, as president of the Ortman-Miller Machine Company, Inc. had taken over the general management and direction of the affairs of said corporation, over which he assumed personal control and responsibility;
63 that during all of the times aforesaid, the said J. Carter Miller was paid a salary and bonuses equal to that paid to each of the other officers and directors.

—6—

In December of 1947, plaintiff Miller started to set up distributors for the cylinder. The first distributor set up was Jarrett Compressor and Equipment Company, of New Jersey. The second distributor arranged for was Hackett Brothers, of Fort Wayne, Indiana. The third distributor was Barney Machine Company, of Pittsburgh, Pennsylvania. Rucker Company (Oakland, California), Parker-Armstrong Company (Philadelphia), Neil K. Armstrong Company (Collingswood, New Jersey), Know, Incorporated (East Walpole, Massachusetts), H. D. MacRae (Rochester, New York),

Associated Pneumatics (West Hartford, Connecticut), Hanscomb-Rogness (Minneapolis, Minnesota), Lincoln Supply Company (Providence, Rhode Island), and Beckett-Harcum Company (Wilmington, Ohio) also became distributors.

In addition to the distributors above mentioned the plaintiff, J. Carter Miller, became a distributor for the 'Corporation' and did business under the firm name and style of Midwest Supply Company, with its principal place of business in Calumet City, Illinois.

Each of the distributors had dealers and/or sales agents either under contract or employed by them. That the Midwest dealers were and are Air Control Development Company (now Air Control, Inc.), Walter Norris Engineering Company, the Mercer Company and Pneumatic Engineering Company. In addition 'Midwest' has had the following sales agents: Gilmore Sales Company, P. W. Rice, Thomas Scaffe, Sintis Engineers, H. C. Halbert, Industrial Sales and Engineering and C. P. Elliott. In addition 'Midwest' has a branch sales office (Midwest Supply Company of Canada in Toronto, Canada) under direction of one Neil Groom. That all of the distributors were treated on an equal basis by the 'Corporation.' "

The Court further finds that none of the said distributors has or had a formal written contract with the corporation. That each has a clearly defined geographical area in which each exercises exclusive jurisdiction and sales rights which was assigned by the plaintiff acting as President of the 'Corporation.'

That the 'Corporation' never has had a sales organization as such and all of its marketing of the sales has been handled through the above mentioned distributors and each distributor has been allowed a thirty per cent discount on all sales.

—7—

The Court further finds that simultaneously with the setting up of the independent distributors men-

tioned in finding six and over a period of time from January, 1948 through the summer of 1949, 'Midwest' organized and established its own dealers and representatives. That the plaintiff as President of the 'Corporation' assigned to the 'Midwest' the most lucrative sales territory and ultimately and on the 26th day of February, 1952, controlled approximately
64 65 per cent of the sales of the products of the 'Corporation.'

—8—

The Court further finds that the products produced by the corporation are sold directly to their various distributors and that each distributor becomes indebted to the 'Corporation' for each purchase made by it from the 'Corporation.'

The Court further finds that at no time has there been any express or implied contract between the corporation and any of its distributors concerning the length of time each distributor agreed to sell the 'Corporation's' products in the territory assigned to it, and that there never has been any express or implied contract between the 'Corporation' and any of its distributors concerning the length of time it would be obliged to sell its product to the distributor and that the 'Corporation' has not by any express or implied contract with any of its distributors agreed to extend exclusive distributorship to its various distributors in the territory assigned to each of them for any specific time.

—9—

The Court further finds that as between the 'Corporation' and the 'Midwest' that no agreement was ever entered into by which they bound themselves to continue their relationship for any certain period of time. The Court further finds that at no time since the organization of the 'Corporation' has the plaintiff ever asked for or obtained the official approval of the Board of Directors of the 'Corporation' for him to act as a distributor of the 'Corporation' for its

products, and that he has never made a full disclosure to all the members of the Board of Directors of the 'Corporation' that he was acting as a distributor for the 'Corporation' under the firm name and style of Midwest Supply Company.

—10—

The Court further finds that the said J. Carter Miller, d/b/a Midwest Supply Company, was indebted to the 'Corporation' in the amount of $95,013.69 for the products of the 'Corporation' which has been sold through the Midwest Supply Company, which said sum is net after charging off the said thirty per cent discount, and has refused to pay the same to the 'Corporation' upon the advice of counsel. That on or about March 10, 1952, a statement was submitted to the said J. Carter Miller by Clarence Harney, the auditor of the company, for the sum of $95,013.69 which the said J. Carter Miller acknowledged as the correct amount due and owing by him to the 'Corporation.'

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The Court further finds that from the time of the inception of the 'Corporation' up to and including 1950, the business of the 'Corporation' was kept on a cash basis instead of an accrual basis, and that during the year 1951 the 'Corporation' was compelled to change from a cash basis to an accrual basis and it was then discovered that the "Corporation" was delinquent in its income tax payments. The
65 Court further finds that through the efforts of said accountant, Harney, the matter of the income tax for the years 1948, 1949, and 1950, was compromised with the Government in the amount of $90,000.00 of back taxes together with interest thereon for said three years in the sum of $8000.00.

—12—

The Court further finds that due to the delinquent tax liability and the fact that J. Carter Miller was

indebted to the 'Corporation' in the sum of $95,013.69, the 'Corporation' was placed in an embarrasing financial position.

—13—

The Court finds that at a special meeting of the Board of Directors of the Corporation held on the 19th day of February, 1952, at which time the plaintiff was present, it was ordered that no consignments be extended to anyone except the present consignment to Rucker & Co., until the further order of the Board.

—14—

And the Court further finds that on February 26, 1952, the members of the Board of Directors met and the meeting was called to order by the President, J. Carter Miller, and that at such meeting it was ordered by a majority vote of the directors that no further orders be accepted by the 'Corporation' from 'Midwest' and that pursuant to such order the representatives of the 'Midwest' were notified of the action of the Board of Directors.

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The Court further finds that Section 3 of the Article 3 of the constitution and by-laws of the 'Corporation' provides:

The Directors of this corporation shall be chosen by the stockholders thereof at their annual meeting to be held as provided in these By-laws, and each Director so chosen shall serve for a term of one year and until his successor is duly elected and qualified. Immediately following the adoption of these By-Laws the stockholders shall choose five persons to serve as Directors until the next annual meeting of the stockholders, and until their successors are duly elected and qualified.

The Court finds that Section 5 of Article 3 of the By-Laws of the 'Corporation' provides as follows:

The directors of this corporation shall elect the President, Vice-President, Secretary and Treasurer of the corporation, provided that said directors may, if they deem proper, elect one person to discharge the duties of Secretary and Treasurer. The Board of Directors may, also, if they deem proper, elect an Assistant Secretary and Assistant Treasurer.

The Court further finds that Section 1 of Article 4 of the By-Laws of the 'Corporation' provides:

66 Clause 1.....The officers of this corporation shall be a Board of Directors, consisting of five members, a President, Vice-President and a Secretary and Treasurer, who shall hold their several offices for the term of one year, and until their successors are elected and qualified provided that the Board of Directors may remove for cause either of said officers at any time.

Clause 2.....The Board of Directors at their first meeting after the adopting of these By-Laws and at their meeting of the stockholders, as in these By-Laws provided for, shall elect the officers mentioned, in Clause 1 of this Article, other than the Board of Five Directors, which shall have been chosen by the stockholders of this corporation as in these By-Laws provided for.

—16—

The Court further finds that on March 5, 1952, that a special meeting of the Board of Directors of the Ortman-Miller Machine Company, Inc. was held and that all members of the Board were present except J. Carter Miller, the plaintiff in this action. That at said meeting the accountant Harney was present and that he reported to the Directors that there may be as much as $125,000.00 which Mr. Miller has withheld and has not accounted for to the 'Corporation', and that at said Board meeting said Harney was requested to sum up a special audit to determine how much Mr. Miller owes the company and to report

the same to the defendant Thorpe as soon as possible and to make due report to the Board at the next session of the Board of Directors.

The Court further finds that at said meeting of March 5, the Board of Directors questioned Mr. Thorpe, who was acting as the attorney for the corporation, as to the status and legal effect of the activities of J. Carter Miller in the past and present and that at said meeting said Thorpe advised the Board of Directors that while J. Carter Miller is holding office as a director and officer of the 'Corporation' and deals with himself personally in the capacity of a person who is contracting with the 'Corporation' the same would not be countenanced by the law; and that no contract of any kind should be entered into with him so long as he is an officer and director of the 'Corporation' and that J. Carter Miller is liable to the 'Corporation' not only for the amounts which he has withheld but may also be liable for any profits which he has realized in the past in his dealings with the 'Corporation' as an office on the one hand and a private individual attempting to contract with the company on the other.

The Court further finds that at said meeting of the Board of Directors on March 5, 1952, the said J. Carter Miller was by all of the members of the Board of Directors, except J. Carter Miller, relieved of his duties as President and employee of the 'Corporation' and that his pay was stopped as of that date and the Secretary of the 'Corporation' was to notify Mr. Miller of the action of the Board of Directors.

—17—

67 The Court further finds that on March 7, 1952, at a special meeting of the Board of Directors at which all of the members were present, defendant Thorpe reported that there was due and owning the 'Corpora-

tion' from J. Carter Miller the sum of $95,013.69, and that the said Thorpe as the attorney for the 'Corporation' had notified J. Carter Miller, by letter, of the exact amount then due and owing by him the 'Corporation' and requested that he pay the same immediately to the 'Corporation' and at said meeting of the Board the action of the attorney was approved.

—18—

The Court further finds that the defendant Straley Thorpe in his dealings with the 'Corporation' acted solely in the capacity of an attorney and at no time conspired with the other defendants in their dealings with the plaintiff, and that the legal advice he gave to the other defendants was what he in good faith believed to be for the best interest of the 'Corporation.'

—19—

The Court further finds that the action of all the defendants, other than Thorpe, acting as the Board of Directors, in relieving J. Carter Miller of his duties as President and stopping his salary was for the protection of their own interests as stockholders in the 'Corporation' and for the best interest of the 'Corporation.'

Conclusion of Law.

1. Upon the above foregoing findings of facts the Court concludes that the law is with the defendants and each of them and by reason of the fact that at no time has there ever been a contract, either express or implied, between the Ortman-Miller Machine Company, Inc. and any of its distributors concerning the exact period of time each distributor agreed to sell the products of said corporation in the territory assigned to it, and no contract, express or implied, has ever been entered into by and between said corporation and any of its distributors concerning the exact period of time it would be obliged to sell its products to each distributor; and that said corpora-

tion has not by any contract, either express or implied, with any of its distributors agreed to extend exclusive distributorship to its various distributors for any certain period of time in the territory alloted to the respective distributors; and that as between said corporation and the plaintiff, d/b/a Midwest Supply Company, no agreement either express or implied has been entered into by which the corporation and the plaintiff were obliged to continue their relationship for any definite period of time. The defendants Alva Ortman, Carl Speichart, Nelson Ortman and Harold Ortman, as members of the Board of Directors of said corporation, or the corproation incurred no legal liability to the plaintiff by refusing to accept further orders from the Midwest Supply Company as shown by action of the Board of Directors at its meeting on February 26, 1952, as set forth in finding number 14.

No. 2. The Court further concludes that the law is with the defendant Straley Thorpe. That he incurred no liability to the plaintiff for his conduct as attorney for the said corporation and for his legal advice to the other defendants as directors of the corporation concerning matters pertaining to the corporation; and that the plaintiff should take nothing by its complaint as against said defendant.

No. 3. The Court further concludes that inasmuch as the removal of the plaintiff as President of the corporation by a majority vote of its Board of Directors was for the best interest of the corporaition as they honestly believed, the Court is without power to pass upon the reasonableness of the removal of the plaintiff as President of the corporation.

No. 4. The Court further concludes that the restraining order heretofore issued by the Lake Circuit Court entered on the 13th day of March, should be in all things dissolved.

No. 5. The Court further concludes that the plaintiff should take nothing by his complaint as against the defendants or any of them and that the defendants

and each of them should recover of and from the plaintiff their costs and charges in this cause laid out and expended."

In this case appellant contends as a major cause for reversal that the trial court's decision is based upon an erroneous theory as to appellant's cause of action; that the theory upon which the decision of the trial court is actually grounded is that of breach of contract between appellant, d/b/a Midwest Supply Company and Ortman-Miller Machine Company, Inc., whereas the real theory of the action as determined by the pleadings is that of tort, namely, conspiracy, to destroy and appropriate appellant's business as Midwest Supply Company. The law is well settled that a decision grounded upon a theory of action not presented by the pleadings and, therefore, not in issue, is contrary to law.(7) Also, the law is well settled that the object of statements of findings of
69 fact and conclusions of law in a case decided without a jury is to ascertain the theory on which the judge decided the case, in order that the right of review for such error might be preserved.(8) Therefore, as heretofore stated, our decision upon this issue must, of necessity, rest upon an analysis of the findings of fact and conclusions of law as stated by the court. Of necessity, this analysis must include, on the one hand, the facts found and the conclusions stated and, on the other hand, the material facts in evidence not found and the necessary resulting conclusions not stated.

In considering the sufficiency of the findings of fact and conclusions of law to sustain the decision, we recognize the general rule (a) that this court must accept ultimate facts as stated by the trial court if there is evidence to sustain them,(9) and (b) that where facts necessary to sustain the issues are not found by the trial court and the findings are silent as to such facts, they

For all footnotes—see page 95.

are regarded as not proved. Under such circumstances the law, in effect, implies negative findings as to such issues against the party having the burden of their proof. ([10]) We also recognize that, as a general rule, where the court states as a conclusion of law "that the law is with the defendants," as in this case, all contrary conclusions not controlling of the general conclusion may be ignored as surplusage.([11]) However, the general rule is subject to exception.

The above rules are intended to apply only where and to the extent that the findings of fact and conclusions of law as stated are related to and support the theory of the case upon which the issues are drawn. If the facts found and the conclusions of law stated demonstrate that the decision is grounded upon an erroneous and incompatible theory of action then under such circumstances, no inference can be drawn as to the facts which are in issue under the correct theory of the case and which are supported by evidence but regarding which the court fails to make a finding of fact or state his conclusion of law as it is his duty to do([12]).

Where special findings of fact and conclusions of law are properly requested and the court fails to find facts and state conclusions of law relative to the necessary issues of the case which are supported by the evidence, but does find facts and states conclusions of law upon a diverse theory of action, from which circumstances it is apparent that the court ignored the evidence upon material issues rather than weighing it, then the decision is contrary to law([13]) and the error is cause for reversal, unless some fact found (and supported by
70 evidence) is sufficient in itself to support the general conclusion "that the law is with the defendants" under any theory of the case.([14])

For all footnotes—see page 95.

We therefore proceed to examine the findings of fact and conclusions of law to determine whether the court decided the case on the correct theory of the action. To accomplish this purpose, we must first examine appellant's complaint to determine the theory of his action. This must be determined by the facts complained of and the relief sought. It is urged by appellees that "The complaint charged the individual appellees with having conspired to unlawfully force a breach of contract between *Midwest* and the *Corporation*, and to depose appellant as President of the Corporation," whereas actually the primary acts complained of and the relief sought by appellant Miller was something entirely different, as shown by the complaint.

As heretofore stated, the acts actually complained of are: " • • • that the defendants • • • 'Joined in a common plan and scheme with the malicious fraudulent and tortuous purpose of:

"(a) Deposing him as president of the corporation and appropriating his salary and income therefrom.

"(b) Forcing and accomplishing (1) a breach of contract between *Midwest Supply Company and its dealers* and sales representatives with the further purpose of (2) destroying Midwest Supply Com-
71 pany and (3) appropriating the dealers, sales representatives and profits to themselves."

The relief sought by appellant, as stated in the prayer of his complaint, is for " • • • a restraining order • • • upon the defendants • • • restraining and enjoining them and/or any of them from

"(a) Committing any further acts of any kind or nature by way of interference with plaintiff's contractual relations through Midwest Supply Company with his dealers as described in paragraph (12) of this complaint.

• • • •

> "(d) Refusing to honor orders placed with the corporation by Midwest Supply Company in the regular course of business and pursuant to accepted contract, practice and custom."

Also, that

> "(4) The plaintiff have and recover damages as incidental to the granting of the permanent injunction, of and from the individual defendants in the sum of Fifty Thousand Dollars ($50,000.00)."

It is not contended by appellant that any appealable issue is presented by reason of (1) the removal of appellant from the office of President of the "Corporation," or (2) the termination of the distributorship contract between the "Corporation" and appellant d/b/a Midwest Supply Company standing alone. Both of these acts, although influenced by misrepresentations of the law by appellee Thorpe, were accomplished by legal means available to the other appellees. Appellant's removal from his office as president was accomplished according to the procedure provided by the By-Laws of the "Corporation." And, as to the termination of appellant's contract as distributor for the "Corporation," it is admitted that there was no formal agreement relative thereto between the "Corporation" and "Midwest" and that any oral agreement between the parties was indefinite as to time and territory. Therefore, it was within the power of the "Corporation" to terminate the
72 distributorship contract as to *future orders* at its will.

It is the position of appellees that it was proper for the court to decide the case upon the theory of these issues which, they assert, are decisive of the cases. They reason that there could be no injunctive relief against or recovery of damages for interference with appellant's distributorship business if they could lawfully terminate

the contract of distributorship itself. In support of this position, appellees cite and rely upon the cases of *Grimm* v. *Baumgart* (1951), 121 Ind. App. 626, 632, 96 N.E. 2d 915, 917, 97 N.E. 2d 871; *International Shoe Company* v. *Lacy* (1944), 114 Ind. App. 641, 53 N.E. 2d 636.

In the *Grimm* case, *supra*, the Appellate Court correctly stated the rule that "There is no civil action for conspiracy, but rather the action is for damages caused by acts committed pursuant to a formed conspiracy rather than by the conspiracy itself * * *" In other words, if the acts committed were lawful there could be no injunctive relief against or liability in damages because of a conspiracy to effect these lawful acts. Therefore, both of these cases are authority for the proposition that, as between the appellant d/b/a Midwest Supply Company and the "Corporation," the latter had the right to terminate the working agreement at any time as to future orders. It is upon this theory that the decision of the trial court is grounded.

However, the fallacy of appellees' argument and the error of the trial court lies in the fact that appellant has not made the termination of appellant's contract as to *future orders* an issue in this case. Appellant's action is concerned with a series of wrongful acts committed by appellees, including the breach of their contract to fill orders *already accepted* from "Midwest," the interference with and misrepresentations to its dealers and sales representatives, all for the purpose of forcing and accomplishing a breach of contract between Midwest Supply Company and its dealers and sales representatives and of appropriating said business including said dealers and sales representatives, and the profits of the busi-
73 ness to themselves. In other words, the gravamen of appellant's complaint is a conspiracy to maliciously

destroy appellant's separate business as "Midwest" through a series of acts which appellees had no right to do. Therefore, the *Grimm* and the *International Shoe* cases, *supra*, in which only lawful acts were committed, are distinguishable from and offer no precedent for a decision in this case, wherein unlawful acts are involved.

Public policy is committed to the proposition that a man is free to conduct a lawful business([15]) and that the good will of a business, including contracts with its dealers and representatives and confidential information, such as the names and addresses and requirements of customers, and the advantage acquired through representative contact with the trade in the area of their application, is a property right which an owner is entitled to protect. This he may do by contract([16]) or in the absence of a contract he may protect the business against any conspiracy to destroy and appropriate it by tortious and unlawful acts.([17])

In the case of *Jackson, et al* v. *Stanfield* (1893) 137 Ind. 592, 608-609, 613, 36 N.E. 345, 350, 351, 37 N.E. 14, *supra*, the law applicable to a conspiracy to destroy a man's business is set forth as follows:

> "• • • A conspiracy formed and intended directly or indirectly to prevent the carrying on of any lawful business, or to injure the business of any one by *wrongfully preventing those who would be customers from buying anything from the representatives of such business, by threats or intimidation*, is in restraint of trade and unlawful." (Our italics.)

Also the language at page 613 of the above cited case is likewise significant:

74 "The great weight of authority supports the doctrine that where the policy pursued against a trade or business is of a menacing character calculated to destroy or injure the business of the persons so

For all footnotes—see page 95.

engaged, either by threats or intimidation, it becomes unlawful, and the persons inflicting the wrong is amenable to the injured party in a civil action for damages therefor. It is not a mere relations, intercourse, and fellowship that creates the liability, but the threats and intimidation shown in the complaint."

Also, the language in the case of *Shoemaker* v. *The South Bend Spark Arrester Company* (1893) 135 Ind. 471, 477-478, 35 N.E. 280, 283, *supra,* quoting Justice Blodgett in *Emack* v. *Kane,* 34 Fed. 46, is significant:

> "'I can not believe that a man is remediless against persistent and continued attacks upon his business, and property rights in his business, such as have been perpetrated by these defendants against the complainant as shown by the proofs in this case.
>
> 'It shocks my sense of justice to say that a court of equity can not restrain systematic and methodical outrages like this, by one man upon another's property rights * * * .'"

We conclude, therefore, that the trial court's findings of fact and conclusions of law, which deal exclusively with appellees' right to discharge appellant as president and to terminate the "Corporation's" contract with "Midwest" with regard to "further orders" (as stated in Finding 14), both of which were *lawful* facts, are not decisive of the issue as to appellant's right to injunctive relief and damages because of the destruction and appropriation of his separate business by *unlawful* acts. It is this combination of acts, lawful and unlawful, allegedly committed pursuant to a conspiracy to destroy and appropriate appellant's separate business, and the prayer for equitable relief therefrom, which determine the theory of appellant's case. The above allegations constituted a valid cause of action and appellant was entitled to have his case decided upon this theory.

As heretofore stated, appellant was entitled to a statement of findings of fact and conclusions of law as a basis upon which to determine the theory upon which the
75 trial court decided his case. We therefore examine the manner in which the trial court stated its findings of fact and conclusions of law upon the evidence in support of these issues to determine the theory on which the case was decided. Upon this examination appellant's case must succeed or fall.

With regard to the conclusions of law, an examination of these stated conclusions clearly demonstrates that the court considered *only* the law as it related to the discharge of appellant as president of the "Corporation" and the termination of the distributorship contract as to "further orders," which were in themselves *lawful* acts. However, for the reasons above stated, these conclusions of law are not decisive of the issue of conspiracy to destroy and appropriate appellant's business by resorting to other acts which were *unlawful*, which is the theory of appellant's action.

Also, for the purpose of determining the theory upon which the trial court decided the action, we next consider (1) the facts found, and (2) the facts supported by substantial evidence but not found, as they relate to the alleged unlawful acts of the conspiracy committed by appellees. The first of these alleged unlawful acts was the "Corporation's" refusal to fill orders from "Midwest" *already accepted* by the "Corporation". The court's findings of fact are wholly silent as to this very material fact which is supported by the undisputed evidence and admitted by appellees.

We next consider the court's findings of fact regarding the alleged acts of appellees, designed to destroy appellant's separate business. Upon this issue the evidence is

undisputed that appellees, as heretofore stated, sent telegrams and letters to all of "Midwest's" dealers and sales representatives, notifying them of their cancellation of "Midwest's" contract and instructing them to *reorder directly with the "Corporation."* This necessitated the breach of their respective contracts with "Midwest."

76 Also the evidence is uncontradicted that appellees Alva Ortman and Thorpe personally called upon at least one of "Midwest's" distributors, a Mr. Gilmore in Detroit, and, in connection with their conversation with him for the purpose of persuading him to break his contract with "Midwest" and deal directly with the "Corporation", stated that there was a possibility that J. Carter Miller would be put in jail "because of the way that business has been conducted." Such representation constituted an actionable wrong, unless justified by other facts appearing in the record.([18])

Furthermore, the evidence is uncontradicted that the "Corporation" in a separate proceedings in attachment tied up appellant's entire bank account which resulted in the "complete strangulation" of appellant's separate business with regard to this and all other products. These acts on the part of appellees, according to all the evidence, were effective in destroying "Midwest's" business as a distributor. They were pertinent to one of the most essential issues under the theory of appellant's complaint, yet the court made no finding regarding them.

Finally we consider the issue as to appellee's alleged wrongful appropriation of "Midwest's" dealers and representatives and the profits of appellant's business. The uncontradicted fact is that appellees were successful in accomplishing this appropriation as it related to the products of the "Corporation." Yet, here again, the court failed to find the facts upon this material issue in the

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For all footnotes—see page 95.

proceedings. Failure of the court to find these facts and state conclusions of law material to the theory of the case was error(14) and the error was reversible, unless other facts found are such as to preclude recovery by appellant, notwithstanding the error.

We therefore search the record for findings of fact which, as a matter of law, would preclude recovery by appellant, notwithstanding the failure of the trial court to find the facts upon the above issues material to
77 the theory of the case, which were sustained by all the evidence. The court made findings of fact (10 and 17) as to appellant's indebtedness to the "Corporation." These facts may have provided additional cause for terminating the contract between appellant and the corporation as to future orders, regarding which appellant makes no issue. Did these facts, if true, also justify appellees' breach of contract with respect to orders already accepted?

We first consider the facts surrounding the refusal of appellees to fill orders for products already secured by "Midwest" through its dealers and agents and accepted by the "Corporation". Failure or refusal to pay for merchandise already delivered might be cause for such cancellation. In Finding 10 the court stated as a fact that " • • • J. Carter Miller d/b/a Midwest Supply Company, was indebted to the 'Corporation' in the amount of $95,013.60 for the products of the 'Corporation' which has been sold through the Midwest Supply Company, • • • and has refused to pay the same • • • upon the advice of his counsel • • • " However, an examination of the evidence discloses that such refusal to pay *followed*, rather than preceded, the alleged breach of contract with respect to said orders and the alleged tortuous interference with appellant's representatives and agents.

For all footnotes—see page 95.

This evidence indicates that this refusal to pay may well have been the consequence, rather than the cause, of the alleged tortuous conduct which is the basis of appellant's complaint.

If actual refusal to pay for products already delivered was not the cause of appellees' refusal to make future delivery of orders already accepted, perhaps then appellant's failure to pay for such merchandise provided justification for such action.

The uncontradicted evidence regarding the financial relationship between "Midwest" and the "Corporation", as a result of which an indebtedness existed, is that,

during the year of 1951, the "Corporation" sold
78 $400,000.00 to $500,000.00 of business to "Midwest"

and it was customary at the end of each year for "Midwest" to owe the "Corporation" amounts as high as $125,000.00 which "would usually be received by the "Corporation" 60 to 90 days after the end of the year." In this particular instance the period of 90 days had not elapsed. The evidence is uncontradicted that, following appellant's discharge as president of the "Corporation" and his exclusion from its offices and the denial of access to its records, a statement of account was contemplated by the "Corporation" to "Midwest" but that no such statement was rendered until Thorpe's letter. The letter from Thorpe to Miller above referred to, in fact, stated in part: "I suggest, therefore, that this balance be paid as soon as possible."

Appellant's reply to the above letter is significant, as to the issue of his *refusal* to pay his account with the "Corporation" prior to their breach of contract. His letter to the "Corporation" is in part as follows:

"We have received a letter from Mr. Thorpe written evidently in answer to our letter request to Ortman-Miller Machine Co. Inc. for written statement on account.

* * *

"Copies of invoices in our hands do not as yet total $95,013.69 as mentioned by Mr. Thorpe, so if you will forward additional invoices and statements, so we can check with our records, and if they agree with your figures, you will receive our prompt remittance." (Our italics.)

Furthermore, as was true of appellant's "refusal" to pay his account, the evidence in the case discloses the further fact which completely refutes the appellees' argument that the orders already accepted were cancelled be-because of "Midwest's" past due indebtedness. Appellees sent the telegrams and letters to "Midwest's" dealers and representatives notifying them of the cancellation of such orders *prior to* the time that Thorpe sent his statement and request for payment to "Midwest."

79 As heretofore stated, the court did not specifically find that the amount owing by appellant to the corporation was past due. Neither do the evidentiary facts correctly stated necessarily lead to such a conclusion.(20) Therefore, there is no merit to the proposition that appellees were justified as a matter of law in cancelling orders from appellant which they had already accepted because of a default by appellant in the payment of his account.

We next consider the facts stated in the court's Finding 9. It seems apparent from all the findings of fact and conclusions of law that the court considered the facts in this finding as they related to the right of the "Corporation" to terminate the contract as to future orders, which right, as above stated, is not in issue. The question which we must now decide is whether the facts stated in

For all footnotes—see page 95.

this finding are sufficient to justify the breach of contract as to the orders already secured by "Midwest" and accepted by the "Corporation" and the other alleged wrongful acts of appellees and whether because of such facts there could be no injunctive relief or damages because of any of the alleged wrongful acts of appellees. The court in Finding 9 stated:

> " • • • that at no time since the organization of the 'Corporation' has the plaintiff ever asked for or obtained the official approval of the Board of Directors of the 'Corporation' for him to act as a distributor of the 'Corporation' for its products, and that he had never made a full disclosure to all the members of the Board of Directors of the 'Corporation' under the firm name and style of Midwest Supply Company."

Obviously the above finding of fact is in two parts. The first is related to an "official approval" of the contract. Admittedly, the corporation had never officially approved the contract. However, such an "official approval" was not necessary if the directors, who were also all the stockholders, had either ratified the contract or were estopped to deny such ratification. This possibility is considered in relation to the issue next discussed.

90 We therefore proceed to consider the second part of the finding, which relates to the propsition that appellant "had never made a full disclosure." We are confronted with this question: If these facts as found are true, was not the contract between appellant d/b/a Midwest Supply Company and the "Corporation" wholly void because of appellant's fiduciary relationship with the corporation and, therefore, were not these orders secured by appellant as an officer of the corporation the property of the corporation so that the corporation was entitled to cancel them as to appellant and take all legitimate and

available steps to pursue and fill them? We are given little help in the briefs upon this issue which is, perhaps, the most troublesome in the case.

The evidence in support of that part of the above finding, relative to "full disclosure," is conflicting and therefore we must accept them as stated. But is the finding as stated controlling of the issue as to the corporation's right to cancel existing orders made by appellant and accepted by the corporation and pursue these orders through "Midwest's" dealers and sales representatives? Do these specific facts exclude the possibility that, notwithstanding the absence of "official approval" by the "corporation" or such "full disclosure" by appellant "to all members of the Board," appellees were, nevertheless, estopped to deny the fact of such distributorship contract because of the fact that with the knowledge they did have they accepted the benefits therefrom over a long period of time?

What is the law regarding the necessity of "full disclosure" by an officer of a corporation in his dealing with the corporation? Clearly the law is not as represented by appellee Thorpe, as stated in Finding 16. The general rule on the subject has been stated by numerous reputable authorities, as follows:

81 "A Director or officer of a corporation is not absolutely precluded by his official position from dealing or entering into a contract with the corporation, nor is such a transaction void per se. While it is true, on the one hand, that where the directors or officers of a corporation deal with themselves as individuals, the transactions are subject to the closest scrutiny, under the most searching light of truth, and must be characterized by absolute good faith, it is also true, on the other hand, that where persons holding positions of trust and confidence in a corporation deal

with the corporation, which is also represented by others in entire good faith, fairness, and honesty, such transactions are not invalid and will be upheld. * * * " 13 Am. Jr., p. 958.

The law on the subject has also been stated as follows:

"The rules given with reference to a director dealing with the corporation, or with himself, and requiring him to account for secret profits, do not mean that a trustee is absolutely prohibited either from dealing with the corporation or from making a profit out of his trust relation. The principles announced are intended to prevent directors from making a secret profit in transactions between themselves and the corporation. They do not impose upon the director an absolute duty to avoid, wholly, the doing of anything for his own benefit; but his obligation to the beneficiaries in the trust is to make full, fair, and complete disclosure of all the circumstances attending any transaction which will benefit himself in any manner different from the manner in which all the shareholders will be benefited. In other words a director is allowed to contract with his corporation in a matter in which he is personally interested, provided he acts with candor and fairness and deals with the corporation on equal terms. * * * " 2 Thompson, Third. Ed., sec. 1329, Directors.

"The contract made by directors with themselves as individuals, are in some cases said to be void; but this word is used in the sense of voidable. The correct principle is that, unless such transactions and contracts fall within the prohibition of the statute, or of a rule of the common law, it is voidable either at the election of the corporation acting through its directors or at the election of stockholders. Ratification in this class of cases, as in other instances, may be assumed from acquiescence and delay. * * * The right of ratification of a contract made with a director belongs to the stockholders and this ratification may be established by evidence of long acquiescence

with knowledge of the transaction on the part of the stockholders • • • " 2 Thompson, Third, Ed., Sec. 1362, Corporation.

Another able authority has stated the law as follows:

"Unless the rights of the public are involved or unless the contract is in violation of some positive law or well-settled rule of public policy, as a general rule, if a corporation, with knowledge of the facts, accepts or retains the benefit of an unauthorized contract or other transaction by its officers or agents, as where it receives and uses or retains money or property paid or delivered by the other party, or
82 accepts the benefit of services, etc., it thereby ratifies the contract or other transaction, or will be estopped to deny ratification. In other words, the law does not permit a corporation to receive and retain the benefits of a contract or transaction and at the same time repudiate liability thereunder or attempt to escape the burdens thereof on the ground that the contract or transaction was not authorized, or that authority therefor was not set forth in its records. • • • " Fletcher Cyclopedia, Corporations, Perm. Ed., Vol. 2, ch. 11, sec. 773, pp. 1137-1143.

We have carefully examined all the cases which have come to our attention in which the court has enunciated the principle that an officer of a corporation who personally deals with the corporation must make "full disclosure" of his interest in the contract. In each of these cases there was a controlling statute.([21]) or an unfair advantage was taken of the corporation.([22]) We find no case in which a corporation in the absence of fraud or unfair dealing has been permitted to breach its contract with an officer and appropriate his separate business or the profits therefrom after knowing of the contract relationship and accepting the benefits therefrom over a long period of time.

For all footnotes—see page 95.

We conclude, therefore, that in this state transactions between an officer of a corporation and a corporation are, at most, voidable and that when the validity of such contracts is challenged by the corporation their validity will not be denied (as a matter of law) if such transactions are fair and honest and made in good faith and carry the earmarks of an arm's length bargain, and there is either "full knowledge" of the transaction on the part of the corporation or some knowledge of a contract relationship and an opportunity for full knowledge thereof, coupled with the acceptance of the benefits therefrom over a long period of time. Under such circumstances the corporation may be said to have ratified the contract or transaction, or be estopped to deny ratification.

We therefore examine the findings of fact to determine first whether the distributorship contract between "Midwest" and the "Corporation" was fair and honest and made in good faith. Finding 6 stated that the "Cor-
83 poration" had no sales organization, that all its sales were through outside distributors and that the contract with "Midwest" was upon terms equally as favorable to the "Corporation" as any of its other distributors. The only possible negative inference on the issue of fair dealing is found in Finding 7, in which the court stated: " • • • That the plaintiff as President of the 'Corporation' assigned to 'Midwest' the most *lucrative* sales territory • • • " However, there is no evidence to support this finding. The only evidence is that "Midwest" produced about 60 per cent of the "Corporation's" Business. The evidence does not disclose whether this productivity was attributable to the territory assigned or the effectiveness of appellant's sales organization. There is no basis of fact upon which to conclude that the transaction was other than fair and honest and made in good

faith and operated to the mutual benefit of both the appellant and the "Corporation."

This brings us to the second major question. It is stated in Finding 9 that the appellant himself "had never made a full disclosure to all the members of the Board of Directors of the 'Corporation' that he was acting as distributor of the 'Corporation" under the firm name and style of Midwest Supply Company." However, as heretofore stated, this fact does not preclude the possibility that the "Corporation" had nevertheless ratified the distributorship contract or relationship or was estopped to deny such ratification because of the fact that its officers and stockholders, with some knowledge of the distributorship and the opportunity for full knowledge regarding it, accepted the benefits therefrom over a long period of time. The evidence upon these issues of knowledge and the acceptance of benefits is as follows: The appellees Carl Speichert, Alva Ortman, Harold Ortman and Nelson Ortman, who, with appellant, were the directors and sole stockholders of the Ortman-Miller Machine Company, worked together daily in the plant and discussed plant affairs. The Ortmans were brothers. All of these appellees knew they were dealing with "Midwest" as a distributor.

Harold Ortman knew "that J. Carter Miller was
84 Midwest Supply Company in 1949," and the other director-stockholder appellees "knew," "understood", or had "intimations" that appellant was Midwest Supply Company, or was connected with it. Also, on the subject of knowledge, all the invoices, totalling approximately 7,500 in number from the "Corporation" to "Midwest" and processed over a period of several years, clearly disclosed the 30 per cent financial arrangement between the "Corporation" and "Midwest". These were available to all the appellees who were officers and/or directors of the

"Corporation." Also, they could have received full knowledge of the transaction from appellee Thorpe, who was attorney for the "Corporation."

Regarding the benefits which appellees received from the distributorship contract over a long period of time, the evidence is undisputed that approximately 60 per cent of the "Corporation's" total business was secured through "Midwest"; that largely through his sales organization the "Corporation" was able to take an unpatented product and with it develop a business from a $5,000.00 corporation in 1945, without an established market, to an enterprise which in 1952 enjoyed a gross annual sales of approximately $650,000.00. That appellees know of this phenominal growth and shared in its profits. These profits were shared by appellees in the form of salaries and bonuses which had been increased from $4,800.00 in 1946, to $12,000.00 in 1951. These profits also consisted of the increased value of their shares in the "Corporation." At the time of this action the "Corporation" had a book value of approximately $250,000.00 and a fair cash market value of $500,000.00 to $600,000.00 of which appellees Carl Speichert, Alva Ortman, Harold Ortman and Nelson Ortman each had a one-fifth interest.

We conclude, therefore, that even though the distributorship contract between the "Corporation" and "Mid west" had received no "official approval" by the "Corporation" and the appellant may not have made a "full disclosure" to the Board of Directors of the "Corporation" that he was acting as distributor for the "Corporation" under the firm name and style of Midwest Supply Company, as stated in Finding 9, nevertheless such finding does not preclude the possibility that as a result of the above facts in evidence the appellees, directors and stockholders of the "Corporation" may

have ratified the distributorship contract or were estopped to deny the fact of such ratification. We cannot say that the evidence would not sustain such a conclusion. Therefore, we cannot say that the facts stated in Finding 9 are sufficient to preclude recovery by appellant and thus make harmless the court's failure to find the facts and state the conclusions of law upon the issues presented under the true theory of appellant's cause of action.

However, appellees contend that notwithstanding the facts not specifically found as above set out, Finding 18 clearly bars recovery as against appellee Thorpe, and Finding 19 bars recovery against the other appellees. We therefore examine Finding 18. It states first: "The Court further finds that the defendant Straley Thorpe in his dealings with the 'Corporation' acted solely in the capacity of an attorney * * * " However, this aspect of the findings is not material. It made no difference in what capacity he acted. It was the nature of his acts and not his capacity which determines the liability for his conduct. *White* v. *McCoy Land Co.* (1936 Missouri) 101 S.W. 2d 763; *Adelman* v. *Rosenbaum* (1938) 133 P. A. Superior Ct. 386, 3 A. 2d 15. The finding then continues: "and at no time conspired with the other defendants in their dealings with the plaintiff, * * * " This is a statement of conclusion, and not a finding of ultimate fact,(23) and must be ignored as surplusage. *Byrum* v. *Wise, Receiver* (1940), 216 Ind. 678, 24 N.E. 1006; *Kaufman* v. *Millies et al.* (1939) 106 Ind. App. 569, 18 N.E. 2d 970: *Lowe's Revision of Works' Indiana Practice*, Vol. 3, page 301. The finding concludes with the statement "and that the legal advice he gave to the other defendants was what he in good faith believed to be for the best interest of the
86 'Corporation'." Were we to consider and accept this statement as a finding of fact, it is not material to

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For all footnotes—see page 95.

the issue of the case. The issue in the case is appellees' wrongful destruction and appropriation of appellant's separate business as "Midwest." It is possible that appellee Thorpe may have believed that his representations and conduct, although without legal justification, were "for the best interest of the 'Corporation.'" In fact, it is the theory of appellant's action that the whole series of events in which he participated were designed to appropriate for the 'Corporation', without cost to it, this very effective, established sales organization which it did not have before. Thorpe may have considered this acquisition "for the best interest of the 'Corporation.'" but what of appellant's rights to this distributorship business which he had developed at great effort and expense to himself? This was the primary issue in the case. However, here again the findings are silent on this issue. Certainly Finding 18 does not preclude recovery under the theory of appellant's cause of action.

Finally we turn to a consideration of Finding 19. It relates to the appellees other than Thorpe. It deals only to the discharge of appellant as president of the corporation. All reference to the destruction and appropriation of appellant's business is again significantly absent.

As heretofore stated, the same deficiency is found in the court's conclusions of law. From this statement it is apparent that the court considered only the right of the appellees to discharge appellant as president of the corporation and of the corporation's right of "refusing to accept further *orders* from Midwest Supply Company" solely because of the indefinite character of the distributorship contract, under which such "further orders" would be taken. No mention is made of destruction and appropriation of appellant's sales organization by appellees, against which interference appellant has asked injunctive relief.

87 It seems apparent from the facts found and not found and the conclusions stated and not stated that the court misconceived the theory of appellant's action and erroneously considered that appellant's action was related only to his discharge as president of the corporation and to the mere termination of his conduct as distributor and decided the case upon this erroneous theory. A decision based upon an erroneous theory of the cause of action is contrary to law.

Judgment is therefore reversed, with instructions to sustain appellant's motion for a new trial and for further proceedings consistent herewith.

LANDIS, C. J., ARTERBURN, BOBBITT and EMMERT, JJ. concur.

Footnotes to Opinion of Supreme Court of Indiana

(1) "The court must, in every stage of the action, disregard any error or defect in the pleadings or proceedings which does not affect the substantial rights of the adverse party; and no judgment can be reversed or affected by reason of such error or defect." Section 2-1701, Burns' 1946 Repl. (Acts 1881 (Spec. Sess.), ch. 38, Sec. 138, p. 240.)

"No judgment shall be stayed or reversed, in whole or in part, by the Supreme Court, for any defect in form, variance or imperfection contained in the record, pleadings, process, entries, returns or other proceedings therein, which, by law, might be amended by the court below, but such defects shall be deemed to be amended in the Supreme Court; nor shall any judgment be stayed or reversed, in whole or in part, where it shall appear to the court that the merits of the cause have been fairly tried and determined in the court below." Section 2-3231, Burns' 1946 Repl. (Acts 1881 (Spec. Sess.) ch. 38, Sec. 659, p. 240.)

(2) The Louisville, New Albany and Chicago Railway Co. v. Creek, Adm'r. (1891) 130 Ind. 139, 29 N.E. 481, 14 L.R.A. 733; Perkins v. Indiana Mfg. Co. (1915) 58 Ind. App. 220, 108 N.E. 165.

"The appellate courts are committed to the policy of attempting to decide all cases upon their merits whenever possible, with increasing regard for the substance and diminishing regard for the form. *Security Sav. & Loan Ass'n* v. *Morgan* (1939) 106 Ind. App. 437, 20 N.E. 2d 707; *Starkie* v. *State* (1943) 113 Ind. App. 589, 49 N.E. 2d 968. To that end it is the policy to place a liberal construction upon the Rules. *Martin* v. *Petgen* (1937) 104 Ind. App. 308, 11 N.E. 2d 59." Flanagan, Wiltrout & Hamilton's Indiana Trial & Appellate Practice, section 2115, ch. 40, p. 4.

(3) *Allen* v. *Public Service Co.* (1952) 122 Ind. App. 421, 104 N.E. 2d 756.

(4) 125 N.E. 2d 257, at p. 258.

(5) 125 N.E. 2d 257, at pp. 258-259.

(6) 124 N.E. 2d 390, at p. 392.

(7) See: *Armacost, Administrator* v. *Lindley, Administrator* (1888), 116 Ind. 295, 19 N.E. 138.

(8) See: *Tarjan* v. *National Surety Co.* (1932) 268 Ill. App. 232; *Sacre* v. *Sacre* (1947) 143 Me. 80, 173 A.L.R. 1261, 55 A. 2d 592, 76 A.L.R. Anno. 1137, 1145, 5 C.J.S. 1197, Sec. 1790, 89 C.J.S. 425, in re Note 44.

(9) See: *Patoka School Twp., Pike County* v. *Ashby* (1938) 105 Ind. App. 235, 14 N.E. 2d 764; *Brown* v. *Brown* (1933) 205 Ind. 664, 187 N.E. 836.

The issue as to whether certain facts found were supported by the evidence was correctly raised in this case by motion for a new trial upon the ground that the decision was not sustained by the evidence. See Flanagan, Wiltrout & Hamilton's Indiana Trial & Appellate Practice, Section 1732, ch. 25, p. 354.

(10) *Newman* v. *Newman* (1943) 221 Ind. 432, 48 N.E. 2d 455; *McCoy* v. *Farm Bureau Mut. Ins. Co.* (1953) 123 Ind. App. 424, 111 N.E. 2d 728; *Stone* v. *Howard Sober, Inc.* (1954) 124 Ind. App. 581, 118 N.E. 2d 504.

(11) Flanagan, Wiltrout & Hamilton's Indiana Trial & Appellate Practice, Sec. 1733, p. 356; *Smith* v. *Smith* (1953) 124 Ind. App. 343, 115 N.E. 2d 217.

(12) Section 2-2102, Burns' 1946 Repl. (acts 1881 (Spec. Sess.), ch. 38, sec. 394, p. 240; 1923, ch. 83, Sec. 1, p. 254):

"The trial court should find all material or controlling facts within the issues of a case where there is credible evidence on the subject. 53 Am. Jur., Sec. 1134, p. 788; 64 C.J., Trial, Sec. 1077, p. 1232. We cannot regard this as a case where a 'failure' to find is equivalent to a finding against the party having the burden. The record before us clearly indicates the court would not make a finding on the issue of actual ownership, and it further indicates the court's reason for refusing to do so. We are not at liberty to close our eyes to the truth as brought home to us by the record." *Automobile Underwriters* v. *Tite* (1940) 119 Ind. App. 251, 254, 85 N.E. 2d 365.

(13) See: Flanagan, etc., Indiana Trial & Appellate Practice, sec. 1733, p. 355.

(14) 53 Am. Jr., Sec. 1134, p. 788, Trial.

(15) See: *Truax* v. *Corrigan* (1921) 257 U.S. 312, 66 L. Ed. 254.

(16) See: *Donahue* v. *Permacel Tape Corporation* (1955) 234 Ind. 398, 127 N.E. 2d 235.

(17) See: *Jackson* v. *Stanfield* (1894) 137 Ind. 592, 36 N.E. 345 37 N.E. 14, supra; *Shoemaker* v. *The South Bend Spark Arrester Company* (1893) 135 Ind. 471, 35 N.E. 280, supra.

(18) *Wade* v. *Culp* (1930) 107 Ind. App. 503, 508, 509, 23 N.E. 2d 615.

(19) See: *Automobile Underwriters* v. *Tite* (1949) 119 Ind. App. 251, 85 N.E. 2d 365; *Gulick* v. *Connely* (1873) 42 Ind. 134.

(20) See: *Angola State Bank* v. *State ex rel. Sanders* (1944) 222 Ind. 244, 52 N.E. 2d 620.

(21) It is required by statute in some states that an officer of a corporation who deals with the corporation must make full disclosure of his interest or that the contract be formally approved or ratified by the corporation. *Union Die Casting Co.* v. *Anderson* (1938) 25 Cal. App. 2d 195, 79 P. 2d 703; *Kennerson* v. *Burbank Amusement Co., Inc.* (1953) 120 Cal. App. 2d 157, 260 p. 2d 823.

(22) *Wainwright* v. *P. H. & P. M. Roots Co.* (1912) 176 Ind. 682, 98 N.E. 8, 11; *Schemmel* v. *Hill* (1930) 91 Ind. App. 373, 169 N.E. 678 *Westerly Theatre Operating Co.* v. *Pouzzner* (1947) 162 Fed. 2d 821; *Schurr* v. *Weaver* (1952) 74 S. D. 378, 53 N.W. 2d 290.

(23) See: *Pennsylvania R. R. Co.* v. *Martin* (1951) 122 Ind. App. 28, 102 N.E. 2d 394; *Cleveland, etc. R. Co.* v. *Baker* (1899) 24 Ind. App. 152, 54 N.E. 814; *Long* v. *Archer* (1943) 221 Ind. 186, 46 N.E. 2d 818; 89 C.J.S., Trial, Sec. 647a, page 487.

90 SUMMARY OF EXHIBITS

(Intervenor introduced in evidence 41 exhibits which have been transmitted to this Honorable Court in original form. Plaintiff Cuthill introduced 2 exhibits in evidence. These exhibits, also transmitted in their original form, consist of 2 printing bills. Defendant offered no exhibits. Consequently, in the interest of time and clarity, all exhibit references will be to intervenor's exhibits.)

INTERVENOR'S EXHIBITS

Exhibit 1:

Minutes of the Board of Directors meeting of Ortman-Miller Machine Company under date of January 26, 1952, at which J. Carter Miller was re-elected President for the ensuing year and the changeover of cash to an accrual method of accounting was approved by corporate resolution.

Exhibit 1A:

Typewritten copy of the notes made by Straley Thorpe at the secret Sunday morning meeting of February 7, 1952, in Thorpe's office attended by Thorpe, Harney, Alva Ortman, Nelson Ortman, Harold Ortman, and Carl Speichert at which meeting Harney represented to the Ortmans and Speichert that Miller juggled the books, had $125,000 of the company's money, and that the men were personally liable to the federal government. Thorpe suggested that he be appointed recording secretary to keep the minutes. Miller was to be required to conduct some special meetings to allegedly straighten out affairs.

Exhibit 2:

Mercantile National Bank ledger sheets showing the checking account of Scott and Gwendolyn Cuthill from September 6, 1950 to September 1, 1953, consisting of 7 sheets.

Exhibit 3:

Duplicate copy of Mercantile National Bank's ledgers
91 of the Clarence Harney account from September 20, 1951 through October 9, 1952.

Exhibit 4:

Photostatic copy of Hoosier State Bank ledgers pertaining to the Scott Cuthill bank account.

Exhibit 5:

Photostatic copy of checking account of Clarence H. or Mamie Harney at Hoosier State Bank from March 13, 1951, through December 31, 1952, consisting of 14 sheets.

Exhibit 6:

Photostatic copy of checking account of Clarence H. or Mamie Harney at Hoosier State Bank of Hammond from Jan. 2, 1953 through February 7, 1955, consisting of 18 sheets.

Exhibit 7:

Minutes of special meetings of the Board of Directors
92 held in Thorpe's office as prepared by Straley Thorpe on the following days:

Tuesday, February 19, 1952—Thorpe selected as recording secretary as per previous arrangement on February 17. General discussion of collateral matters. Nothing shown with reference to Harney's representations.

Tuesday, February 26, 1952—7:30 p. m. Speichert asks about taking over Midwest. Board votes to accept no further orders from Midwest.

Thursday, February 28, 1952—Thorpe reports that "contract for employment of field engineer is in process and that a memorandum may be ready by March 3." Miller is absent from meeting.

Monday, March 3, 1952—7:30 p. m. Harney present. Mrs. Miller present in J. Carter Miller's absence. Thorpe, Ortmans and Speichert also attend. Thorpe reports on proposed contract with J. Carter Miller pursuant to previous discussions.

Wednesday, March 5, 1952—Harney, Thorpe, Ortmans and Speichert present. Harney reports that there may be $125,000 which Miller has withheld and not accounted for to the corporation. Thorpe advised Ortmans and Speichert that Miller's conduct in dealing with Ortman-Miller as a distributorship would not be countenanced by the law, that Miller be dismissed as an officer of the corporation; that no contract be entered into with Miller as long as he is an officer or director of the corporation; that Miller is liable to the corporation for past profits in the distributorship. Resolution adopted relieving Miller as President and stopping his pay.

Friday, March 7, 1952—Miller denied right to have previous minutes read. Miller prevented from attending with his attorney. Thorpe reports that upon information furnished him by Clarence Harney, there is $95,013.69 which Miller had not accounted to the company for. Alva Ortman elected President.

Tuesday, March 11, 1952—7:35 p. m. Miller and his lawyer again excluded. Determination made to start

bank account in the Hoosier Bank. Minutes of previous meetings of February 19, 26, 28 and March 3, 5 and 7 are read and approved.

Exhibit 8:

Copy of employment contract prepared by Thorpe and tendered to Mrs. Miller at the meeting of March 3, 1952 in Thorpe's office containing the provision that Miller post his corporate stock endorsed in blank to guarantee faithful performance of the contract and that his liability for breach should be fully satisfied by the company taking over the stock as the property of the company.

Exhibit 9:

Copy of agreement between Midwest Supply of
93 Canada and J. Carter Miller under date of April 1, 1950 establishing John S. Turner in charge of the Canadian office. (Drawn by Thorpe.)

Exhibit 10:

Certified copies of pleadings in damage suit entitled Cause No. 43-52 of the Jasper Circuit Court in which Ortman-Miller sued Miller on an account stated and obtained restraining order and garnishment summonses against Miller's bank account

Exhibit 11:

Certified copy of order of May 7, 1953 in Cause No. 43-52 ordering issuance of garnishment processes against Miller's account in the Mercantile National Bank of Hammond.

Exhibit 12:

Amended cross-complaint for damages for fraud filed by Miller against Straley Thorpe, Clarence Harney, the Ortmans and Spichert in Jasper Circuit Court

Cause No. 43-52 on December 8, 1953. Also answer of fraud to the claim of Ortman-Miller Machine.

Exhibit 13:

Garnishment affidavit filed by Thorpe on May 4, 1953 in Cause No. 43-52.

Exhibit 14:

Certified copy of court order dissolving garnishment processes entered in Cause No. 43-52 on November 4, 1954.

Exhibit 15:

Certified copy of complaint for damages on injunction bond filed in Lake Circuit Court May 7, 1953, under Cause No. C53-399, and venued to Newton Circuit Court on July 23, 1954, and given cause No. 13458.

Exhibit 16:

Certified copy of complaint for damages for malicious abuse of legal process filed in the Lake Circuit Court on November 25, 1953, under Cause No. 53-1145, and venued to Newton Circuit Court and given cause No. 13446.

Exhibit 17:

Certified copy of complaint, filed in Lake Superior Court, Room No. 1, Lake County, Indiana, on May 7, 1952, under cause No. 66395, and venued to Newton Circuit Court on July 8, 1953, and given cause No. 13320.

Exhibit 18-A:

Certified copy of Appellee's Brief filed on July 26, 1954, in Cause No. 11184, United States Court of Appeals (by plaintiff-appellee).

Exhibit 18-B:

Certified copy of brief of appellee Ortman-Miller
95 Machine Company, filed July 26, 1954, in the United States Court of Appeals in Cause No. 11184.

Exhibit 19:

Certified copy of motion and information to disbar, copy of answer, and copy of findings and judgment entered in Newton Circuit Court on January 17, 1955, in Cause No. 13845.

Exhibit 20:

Deposition of Charles N. Gilmore, witness on behalf of plaintiff in Cause No. 33-52, Jasper Circuit Court.

Exhibit 21:

Discovery deposition of Clarence Harney in case at bar, taken January 29, 1955.

Exhibit 22:

Discovery deposition of Scott Cuthill in case at bar, taken January 29, 1955.

Exhibit 23:

Transcript of testimony of Clarence H. Harney in Cause No. 13485, Newton Circuit Court.

Exhibit 24:

Check of Ortman-Miller Machine Co., Ind., by J. Carter Miller, dated August 30, 1951, to Clarence H. Harney (check No. 5349 on Mercantile National Bank of Hammond) in the amount of $1150.

Exhibit 25.

Letter to Ortman-Miller Machine Co. from Clarence Harney, dated August 29, 1951.

Exhibit 26:

Recapitulation of purchase order record of Ortman-Miller Machine Company between January 1, 1951,

96 and February 25, 1952, consisting of 74 sheets, top sheet entitled "Sales by Dollar Volume by Individual Outlets January 1, 1951, through February 25, 1952, Recap Sheet."

Exhibit 27:

Recapitulation of purchase order record of Ortman-Miller Machine Company between March 6, 1952 and April 2, 1952, consisting of 6 sheets (Midwest Supply orders).

Exhibit 28:

Recapitulation of purchase order record of Ortman-Miller Machine Company between March 13, 1952 and April 4, 1952, consisting of 7 sheets, top sheet entitled "Recap Sheet" (Midwest Supply orders).

Exhibit 29:

Photostatic copies of Cuthill's application for renewal of license to drive and application for registration of 1946 Pontiac coupe.

Exhibit 30:

Letter dated November 12, 1953, from Asher, Gubbins and Segall by Lee M. Burkey, to James J. Richards.

Exhibit 31:

Longhand notes of February 14, 1952 meeting taken by Mr. Thorpe in Thorpe's office during Miller's absence.

Exhibit 32:

Longhand notes of February 17, 1952 meeting taken by Mr. Thorpe in Thorpes' office during Miller's absence in Florida.

Exhibit 33:

Carbon copy of agreement (unsigned) between Ortman-Miller Machine Company, Inc., and J. Carter Miller with stock forfeiture provision.

Exhibit 34:

Copy of transcript of testimony of Straley Thorpe in Rensselaer case.

Exhibit 35:

Certified copy of restraining order issued by Special Judge Herbert Johnson on March 13, 1952, in Cause
97 No. 35157, restraining interference with Midwest's dealers and salesmen.

Exhibit 37:

Certified copy of order of court in Cause No. 66270, Lake Superior Court Room 5, dated March 18, 1952, tying up Miller's bank account in the Mercantile Bank.

Exhibit 38:

Statement of Ortman-Miller Machine Company, Inc., to J. Carter Miller, dated March 6, 1952.

Exhibit 39:

Letter of Ortman-Miller Machine Company, Inc., per N. H. Ortman, to Midwest Supply Company, Subject, Thew Shovel Co., dated January 30, 1952, with enclosures.

Exhibit 40:

Copy of minutes of all directors' meetings of Ortman-Miller Machine Company and Articles of Incorporation.

Exhibit 41:

Typical invoice of Ortman-Miller Machine Company, Inc.